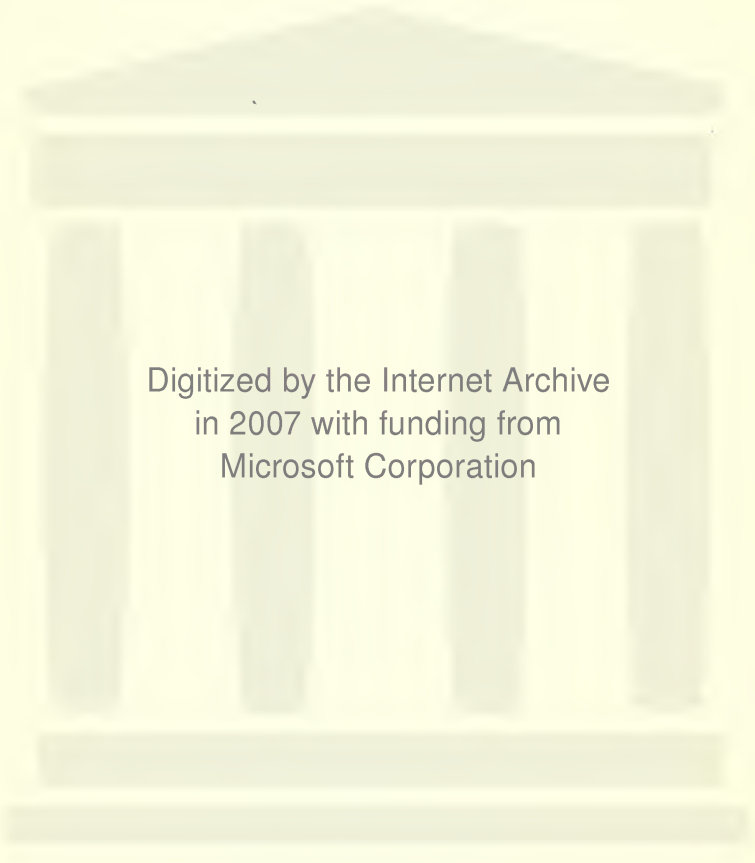
BEARD

LANDS GRANTED TO AND WITHDRAWN FOR THE BENEFIT OF SOUTHERN PACIFIC RAILROAD CO. OF CALIF.



The Lands Granted to and Withdrawn

FOR THE BENEFIT OF THE

SOUTHERN PACIFIC RAILROAD COMPANY

OF CALIFORNIA.

HENRY BEARD,

Attorney for the Southern Pacific R. R. Co. of California.

JUDD & DETWEILER, PRINTERS.

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OF CALIFORNIA.

WASHINGTON, D. C., *February*, 1887.

Hon. W. A. J. SPARKS,

Commissioner of the General Land Office.

SIR: I have the honor to acknowledge the receipt of your letter of the 21st of December, 1886, as follows:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Dec.* 21*st*, 1886.

"HENRY BEARD, Esq.,
"*Attorney for Southern Pacific Railroad Company,*
"*Washington, D. C.*

"SIR: By act of Congress approved July 6, 1886 (Pamphlet laws, p. 123), all the lands granted to the Atlantic and Pacific Railroad Company by act of July 27, 1866 (14 Stat., 292), with certain exceptions named, 'which are adjacent to and coterminous with the uncompleted portions of the main line of said road,' were declared forfeited and restored to the public domain.

"The limits of the forfeited grant in the State of California are intersected by those of the grant to the Southern Pacific Railroad Company by acts of July 27, 1866 (14 Stat., 292), and March 3, 1871 (16 Stat., 573). The lands within the

conflicting or intersecting limits may be divided into six classes, as follows:

"1. Those within the common granted limits of the Atlantic and Pacific and the main line of the Southern Pacific.

"2. Those within the granted limits of the main line of the Southern Pacific and the indemnity limits of the Atlantic and Pacific.

"3. Those within the granted limits of the Atlantic and Pacific and the indemnity limits of the main and branch lines of the Southern Pacific.

"4. Those within the common indemnity limits of both roads, and also those within the common indemnity limits of the Atlantic and Pacific and the branch line of the Southern Pacific.

"5. Those within the common granted limits of the Atlantic and Pacific and the Southern Pacific branch line.

"6. Those within the indemnity limits of the Atlantic and Pacific and the granted limits of the branch line of the Southern Pacific.

"In submitting to the Secretary of the Interior certain recommendations respecting the restoration of the forfeited lands, this office suggested that the restoration of the lands within the intersecting limits be deferred for the present, and that the Southern Pacific Railroad Company be allowed an opportunity to show cause why such lands should not be restored.

"By letter dated the 10th inst., the Hon. Secretary approved this recommendation as being the wisest course in view of the complications, but directed that prompt action in the matter be taken, so that the forfeited lands could be opened to the public at the earliest possible day.

"You will, therefore, be allowed a reasonable period within which to show cause, if any exists, why the lands embraced in said classes, or any of them, should not be restored.

"It is requested that this matter receive your early attention, as it is desirable that the questions involved be determined at the earliest day possible.

"Very respectfully,

"W. A. J. SPARKS,
"*Commissioner.*"

I take occasion to express my high appreciation of your sense of proprietyand justice, in calling upon me to submit the views of the Southern Pacific Railroad Company of California as to its rights and interests in the lands in California that were withdrawn for its benefit before any attempt was made to locate a contemplated line for the Atlantic and Pacific Railroad Company through that State.

We have confidence that what we submit in the following pages will receive the careful consideration of yourself and the Honorable Secretary of the Interior.

You have recognized the great importance to our company of any action of your office that might disturb the status of the lands that have been withdrawn for our benefit.

The fact stated by you, that the limits of the Atlantic and Pacific road in California were located so that its withdrawal limits in many places overlapped or clashed with the previous withdrawals for the benefit of our Southern Pacific road, was well known to Congress and the country when the forfeiture act was passed; likewise the fact that the Atlantic and Pacific Company had done nothing further toward building a road in California; also that the Southern Pacific Railroad Company had fully completed its road under its grant of 1871, and also all, excepting some 80 miles, of its main line under the act of 1866 and the joint resolution of 1870. It must be assumed also that Congress knew that prior withdrawals for our company were made in the public lands without any reference whatever to the future route of the Atlantic and Pacific road, and that the withdrawals for the latter road contained no references whatever to those previously made for the Southern Pacific Company of California.

It must be assumed that Congress knew that the main line of the Southern Pacific railroad of California was located January 3, 1867, and the withdrawals ordered by the Secretary of the Interior March 19, 1867; that the line of route for the same company's branch line was located April 3, 1871, and a withdrawal was ordered by the Secretary on the same day, and that the orders were duly issued to and received by the local land officers; and also that the locations for the Atlantic and Pacific road were made and accepted by the Secretary of the Interior April 11, 1872, and April 16, 1874, upon which the withdrawals were made for that company.

The diagram made in your office shows that the line of the Atlantic and Pacific location is almost coincident with that of the Southern Pacific main line for nearly two hundred miles westward from the crossing of the Colorado river, and crosses the branch line of the Southern Pacific Company about 30 miles north of Los Angeles, which is there upon a north and south course, whilst the Atlantic and Pacific line is an east and west course in that locality, showing a body of land about 40 miles square common to the primary limits of both roads. With these conflicts of the primary limits, extensive conflicts of the secondary limits are also exhibited.

It must be assumed that all these facts, which for ten years had been shown upon the official maps and plats of the United States surveys in California, were fully known to Congress when the act declaring the forfeiture was passed.

(For copies of withdrawal orders for the Southern Pacific Railroad in California, see Appendix, Nos. 3 and 5.)

It appears from the records of your office that, on the 15th of December last, in accordance with a letter addressed to

you by the Secretary of the Interior, you issued to the register and receiver at Los Angeles, California, the following instructions, and on the same day similar instructions to the United States land officers at San Francisco, California, and Sante Fe, New Mexico.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *December 15th*, 1886.

"Register and Receiver, Los Angeles, Cal.

"GENTLEMEN: The act of July 6, 1886, (Chap. 637, pamphlet copy, p. 123) provides that all the lands, with certain exceptions named, heretofore granted to the Atlantic and Pacific Railroad Company, 'which are adjacent to and coterminous with the uncompleted portions of the main line of said road, * * * be, and the same are hereby declared, forfeited and restored to the public domain.'

"You are hereby instructed under said act, and in compliance with instructions received by this office from the Hon. Secretary of the Interior, dated Dec. 10th, inst., to cause to be published in a newspaper having a general circulation in your district, for a period of thirty days, a notice that the odd-numbered sections of land heretofore withdrawn for said grant, in California, except those within the limits of the withdrawals for the benefit of the Southern Pacific Railroad Company's main and branch lines (the restoration of which is, for the present, suspended) have been restored, and that the books of your office are now open for the entry of said lands under the pre-emption, homestead, and other laws relating to unoffered lands; that the price of even-numbered sections within the 20-mile primary limits of the withdrawal for said Atlantic and Pacific Railroad Company will remain at $2.50 per acre, and that the restored odd-numbered sections within said limits will be rated at the same price.

"A copy of the paper containing this notice should be promptly forwarded for the information of this office.

"The receiver, as disbursing officer, will pay the cost of publication, and forward a copy of the notice with proof of publication, as his voucher for the disbursement.

"Very respectfully,

"W. A. J. SPARKS,
"*Commissioner.*"

THE PRACTICAL AND IMPORTANT QUESTION,

which covers all the present ground of executive action, is this:

Does this new law—this forfeiture act—call for any further restoration of lands than has already been ordered?

This is the main question of present moment, in which the Southern Pacific Railroad Company of California is very largely interested, but it has no interest in lands within the Atlantic and Pacific limits that have never been withdrawn for the Southern Pacific grants.

The Southern Pacific Railroad Company of California claims that *the lands withdrawn for its benefit cannot now be restored to market for the following reasons:*

1. The forfeiture act referred to does not sanction it.

2. The Executive Department has not now the legal authority to restore them.

3. On consideration of the law and facts in the case, it appears that the Southern Pacific Railroad Company was entitled to patents for all the lands of its grant opposite road completed when the forfeiture law was passed, and beyond this there are good and sufficient reasons why the rights and claims of the Southern Pacific Railroad Company should not be disturbed or called in question by any order for the restoration of lands.

I.

The action already taken is all that is required by the said act of July 6, 1886.

That act is as follows:

AN ACT to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and a telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, side tracks, turn-tables, and water stations heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared forfeited and restored to the public domain.

Approved July 6, 1886.

On careful consideration of this act it will be noticed that it speaks of a main line of railroad "contemplated to be constructed" by the Atlantic and Pacific Company under the former act of Congress. It declares a forfeiture of lands

against said company which had been granted to aid in construction of the *contemplated road*, but the forfeiture is only of lands "adjacent to and *coterminous with the uncompleted portions of the main line of said road.*" As to the lands adjacent to and *coterminous with the completed portions of the said road* it is clearly implied, from the positive terms of the enactment, that Congress does not intend a forfeiture of them, and does not intend to diminish the grant or to unsettle its hold upon lands adjacent to completed portions of that road, although that company (as was well known to Congress) had not fulfilled all the provisions of the original grant within the times therein limited.

We conclude that *Congress intends no penalty whatever against completed road* in the hands of the Atlantic and Pacific, or those of any other company. Inasmuch as the Atlantic and Pacific Company is to have the whole quantity of its grant opposite the completed portions of its road, it follows that the same liberal intention applies to any grants that may have been made by the same law to another company which has completed its road. Its grant stands unaffected. Should the Atlantic and Pacific railroad build a road hereafter upon the now uncompleted portions of its line, it cannot have the aid of the land grants made in 1866, but now declared forfeited, because of its failure to comply heretofore with the terms of the said grant of July 27, 1866.

We respectfully call attention to the views of the Hon. Secretary of the Interior in his letter to you of the 10th of December last, hereinbefore mentioned.

He noticed the fact that the "price of the even sections" along the Atlantic and Pacific route was "raised by the

"act of Congress (of 1866) and must remain as fixed thereby "unless some like authority be shown requiring or empow- "ering their reduction. This reduction, or authority to "reduce, is not found in the forfeiture act of July 6, 1886."

He held that "the act of 1866 is yet in force" in this respect.

The principle of the Secretary's decision is fundamentally sound. The forfeiture act has not repealed or modified the original law, except in the paragraph declaring the forfeiture, and that said forfeited lands "be restored to the public domain." The forfeiture act had no concealed power or intent unknown to the common reader. It was not a mine of death and destruction to unnamed railroad enterprises.

As all the facts existing July 6, 1886, are necessarily supposed to have been known to Congress, [the fact that the Southern Pacific lands had been withdrawn before, and without any reference to the filing of the map of the Atlantic and Pacific road, and that the Atlantic and Pacific withdrawals had been ordered without regard to those for the benefit of the Southern Pacific Company,] it is plain that, as there is no mention of the Southern Pacific lands in the forfeiture act, there was no intention to change or vacate the first withdrawals for the benefit of our company, or to have any question raised as to their validity and integrity. They were to stand; and the subsequent withdrawals for the other company were alone wiped out.

It will not escape the notice of those who carefully examine this forfeiture act that its fair intendment is not to disturb the Southern Pacific grants.

It provides that all the lands granted by the act of July 27, 1866, to said Atlantic and Pacific Railroad Company,

" which are adjacent to and coterminous with the uncompleted portions of the *main line of said road*," are declared forfeited. These words limit the forfeiture to the *main line of that road;* hence it is not intended that they shall extend to the branch roads.

Now, the Southern Pacific in California *is one of the branch roads to the Atlantic and Pacific road that is provided for in said act of July* 27, 1866. Section 18 of said law provided that our road should connect with the Atlantic and Pacific so as to form a railroad line to San Francisco, and for " aid in the construction thereof"—that is, the branch to San Francisco,—" shall have similar grants of land."

Congress, by confining the forfeiture to *the main line*, practically provides that it shall not extend to a branch, and the Southern Pacific railroad is clearly intended to be protected, for it is a branch road, provided for in said act of 1866 making the grant to the Atlantic and Pacific Company.

There is nothing in the forfeiture act to repeal, modify, or alter the terms of prior laws on this subject. Where they have taken effect, that effect is not in the slightest degree disturbed.

The original grant reserved the right of Congress, for specified objects, to alter, amend, or repeal that act. In all the modifications thereof made by Congress from that day to this, which are intended to apply to the Southern Pacific Railroad Company, Congress has not, either from delicacy, fear, or superstition, abstained from uttering the name of our company.

15 Stat., p. 79; 15 Stat., p. 187; 16 Stat., p. 382; see Appendix.

If the act of July 6, 1886, had been intended in any manner to affect the rights or status of our company, it would not have omitted to mention its name and fate.

The general intention of the laws of grant is, to give the quantity of a full grant of lands opposite each section of completed road, and this intention is maintained by the forfeiture act, the effect of which is limited to uncompleted portions of road.

All that our company demands is a full subsidy in lands, and the legislative denial of subsidy in money emphasizes the legislative intention of a full subsidy in land.

This intention is likewise emphasized by the unusual provision in the grant (section 3) that "in lieu" of mineral lands (not coal or iron) within the limits of the grant, "a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided," viz., under the direction of the Secretary of the Interior.

Neither is there any provision in the act of 1886 that the Southern Pacific Railroad Company should lose any land by reason of the failure of the Atlantic and Pacific Company to build any part of its road.

The legal effect of the declared forfeiture is, therefore, to deprive the Atlantic and Pacific Company of the heretofore existing right to acquire any lands opposite to the uncompleted portion of that road, and it has no further effect.

The suggestion that the main line of the Southern Pacific road could not be located until that of the Atlantic and Pacific was fixed, can find no place under the act of 1866, much less after the confirmation by Congress in 1870 of the

route that had been located in 1867. The fact is, that the two railroads have been so located and constructed that they do meet and connect at the point designated by law.

We claim, therefore, that after the fact has been legally established that the Atlantic and Pacific Company can never acquire right to any lands in California, the grants to the Southern Pacific Company must be administered as though the Atlantic and Pacific road had never been located through that State, and the declaration that the forfeited lands are restored to the public domain does not apply to any tracts within the limits of the Southern Pacific grants and the withdrawals for its use.

II.

We come now to the proposition that the Secretary of the Interior has not legal authority to restore to market any of the lands withdrawn for the benefit of the Southern Pacific railroads of California.

The grants to the Southern Pacific Railroad Company of California are by section 18 of the act of Congress of July 27, 1866, and the 23d section of the act of March 3, 1871.

The acts referred to are as follows:

(*Act of July 27th*, 1866.)

"SEC. 18. *And be it further enacted*, That the Southern Pa-
" cific railroad, a company incorporated under the laws of
" the State of California, is hereby authorized to connect
" with the said Atlantic and Pacific railroad, formed under
" this act, at such point near the boundary line of the State
" of California as they shall deem most suitable for a rail-
" road line to San Francisco, and shall have a uniform guage
" and rate of fare or freight with said road; and in considera-
" tion thereof, to aid in its construction, shall have similar

" grants of land, subject to all the conditions and limitations " herein provided, and shall be required to construct its road " on the like regulations, as to time and manner, with the " Atlantic and Pacific railroad herein provided for."

(*Act of March 3d*, 1871.)

" SEC. 23. That, for the purpose of connecting the Texas " Pacific railroad with the city of San Francisco, the South- " ern Pacific Railroad Company of California is hereby " authorized (subject to the laws of California) to construct " a line of railroad from a point at or near Tehachapa Pass, " by way of Los Angeles, to the Texas Pacific railroad, at or " near the Colorado river, with the same rights, grants, and " privileges, and subject to the same limitations, restrictions, " and conditions as were granted to said Southern Pacific Rail- " road Company of California by the act of July twenty-seven, " eighteen hundred and sixty-six: *Provided, however*, That " this section shall in no way affect or impair the rights, " present or prospective, of the Atlantic and Pacific Railroad " Company or any other railroad company."

(Full extracts from the act of July 27, 1866, and supplemental and amendatory acts relating to the Southern Pacific railroad will be found in the Appendix, No. 1.)

It will be noticed that the grant of March 3d, 1871, is of the same rights, grants, and privileges, and subject to the same conditions as specified in the act of July 27, 1866.

Directing our remarks, first, to the Southern Pacific railroad of California—main line—it appears that on the 3d of January, 1867, a map of the route of said road, located under the above-quoted section 18 of the act of 1866, was filed in the General Land Office.

On the 19th March following, the Secretary of the Interior ordered " a withdrawal of lands on account of said road" to be made, so as " to withdraw the odd sections within the

granted twenty miles on each side as shown by the map," " and also withdraw the odd sections outside of the twenty and within thirty miles, on each side, from which the indemnity for lands disposed of within the granted limits is to be taken."

See copy of this order in the Appendix; also copy of the withdrawal instructions issued to the local land officers by the Commissioner of the General Land Office, No. 3.

The Commissioner, in his instructions, referred to the 6th section of the law making the grant, and called attention to the fact that thereby the lands within the limits of the grant were held for the benefit of the road.

The 6th section thus referred to, is as follows:

SEC. 6. "*And be it further enacted,* That the President of " the United States shall cause the lands to be surveyed for " forty miles in width on both sides of the entire line of said " road after the general route shall be fixed and as fast as " may be required by the construction of said railroad; and " the odd sections of land hereby granted shall not be liable " to sale or entry or pre-emption before or after they are " surveyed except by said company, as provided in this act; " but the provisions of the act of September, eighteen hun- " dred and forty-one, granting pre-emption rights, and the " acts amendatory thereof, and of the act entitled 'An act to " secure homesteads to actual settlers on the public domain,' " approved May twenty, eighteen hundred and sixty-two, " shall be, and the same are hereby, extended to all other " lands on the line of said road when surveyed, excepting " those hereby granted to said company."

In April, 1875, the Secretary, having before him a "test case," as he said (Queen *vs.* Southern Pacific Railroad Co. Copp's L. O. for April, 1876, p. 5), decided thus:

" The company filed a map defining their route January " 3d, 1867." * * * " The law was complied with when

"the map reached the Commissioner's office." "If the map "be regarded as a designation of the general route of road, "then the 6th section of the act of 1866 protects the odd "sections from sale or entry or pre-emption from the time "the map was filed. *Said section operates as a legislative with-* "*drawal of the land granted to the road.*"

This is substantially the same interpretation of the law since given to it by the courts. When the map was filed, the Department could neither help nor harm the withdrawal. It took effect by law, whether the Secretary or Commissioner concurred in or opposed the withdrawal.

This decision has been maintained in the Department since that time, the only modification, as held in the Tome case, August, 1878, (Copp's L. O., vol. 5, p. 85.) being such as arises under the joint resolution of 28th June, 1870, in favor of settlers prior to the date of said joint resolution.

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." (Missouri, Kansas and Texas Railroad Co. *vs.* Kansas Pacific Railroad Co., 97 U. S. Reps., 497.)

This is the rule prescribed by the United States Supreme Court for Congressional land grants such as have been made by the laws cited to the Southern Pacific Railroad Company of California.

It is on this principle that the courts have held that the words of section 6, above quoted, establish a reservation of lands along the route for a road that may be located under this law, without reference to the capacity of any grantee to receive the grant, and without reference to the omission

or performance of any future act required to perfect the grantee's title to the lands.

It has recently been decided by the Supreme Court of the United States that the section, in exactly the same words, in the Northern Pacific railroad grant, *establishes a withdrawal of lands along the route of that road by force of the statute itself.*

The decision was made in November last in case No. 18 on the docket of the current term of the Court, in the case of Buttz, executor of Peronto, *vs.* The Northern Pacific Railroad Co., appealed by Buttz from the supreme court of the Territory of Dakota. It had not become publicly well known on the 10th of December last. (See 119 U. S. Rep., 55.)

The Court said:

"When the general route of the road is thus fixed in good "faith, and information thereof given to the Land Depart- "ment by filing the map thereof with the Commissioner of "the General Land Office or the Secretary of the Interior, "the law withdraws from sale or pre-emption the odd sec- "tions to the extent of forty miles on each side. The object of "the law in this particular is plain; it is to preserve the land "for the company to which, in aid of the construction of the "road, it is granted. Although the act does not require the "officers of the Land Department to give notice to the local "land officers of the withdrawal of the odd sections from "sale or pre-emption, it has been the practice of the Depart- "ment in such cases to formally withdraw them. It cannot "be otherwise than the exercise of a wise precaution by the "Department to give such information to the local land offi- "cers as may serve to guide aright those seeking settle- "ments on the public lands and expenditures connected "with them which would afterwards prove to be use- "less." * * *

"Accordingly, on the 30th of March, 1872, the Commis- "sioner of the General Land Office transmitted a diagram

" or map, showing this route to the officers of the local land " office in Dakota, and by directions of the Secretary ordered " them to withhold from sale, location, pre-emption, or " homestead entry all surveyed and unsurveyed odd-num- " bered sections of public land falling within the limits of " forty miles, as designated on the map.

" This notification did not add to the force of the act " itself, but it gave notice to all parties seeking to make pre- " emption settlement that lands within certain defined limits " might be appropriated for the road."

This decision has been promptly accepted by the Secretary of the Interior as authoritative in determining cases before him on appeal. In the case of Matthew Sturm's application for S. ½ of N. E. ¼ of sec. 5, tp. 7 N., R. 31 E., Walla Walla district, February 10, 1883, the Secretary, in decision of December 18, 1886 (5 Dec., 295), said:

" When the Northern Pacific Railroad Company filed its " map of general route, February 21, 1872, the tract in " question *became by law withdrawn for the benefit of said com-* " *pany.*"

Buttz *vs.* N. P. R. R. Co., 119 U. S., p. 55.

In the Buttz case the decision holds that the law itself takes hold of the granted lands and establishes a withdrawal on the acceptance of the map of the route of the road; that the executive order is proper, but adds nothing to the law.

The Court, in that case, treat that withdrawal as effective to the width of the grant—forty miles on each side—and as effectual for any one section within the limits as for any other.

In the case of the Southern Pacific Railroad Company the 6th section of the act of 1866 is effective for the twenty miles on each side, if not for the thirty miles.

The withdrawal—at least to that extent—having been established by law, it is clear that executive officers cannot set it aside without authority of another statute.

To vacate it would require an act of Congress as directly applicable to our roads as is the forfeiture act of July, 1886, to the uncompleted portions of the Atlantic and Pacific railroad.

The same judicial conclusion has been reached and administered repeatedly in the United States circuit court for the State of California, under the jurisdiction of which the lands of the Southern Pacific Railroad Company are found.

6th Sawyer's Reports, 157. Orton *vs.* R. R. Co.

In the light of the above-quoted decision of the United States Supreme Court we claim confidently that the opinion of the United States circuit judge pronounced in the Orton case was correct, and should be accepted by the Interior Department as controlling.

I quote from that decision, as follows:

"Instantly upon the filing of the plat the odd sections within the prescribed limits on each side of the line indicated became affected by these provisions, and the statute itself *proprio vigore* withdrew them from sale, entry, or *pre-emption except by the company.* From that time forth to the present time no man could acquire a pre-emption right, because it was expressly prohibited by the statute, and these provisions of the statute have never yet been repealed or modified; and this is so, whether the grantee was capable of receiving title or not. The withdrawal is not made to depend upon the capacity of the grantee to take, or upon the grantee's performance of the conditions subsequent, so as to perfect the title; but it is absolute without conditions upon the performance of certain designated acts, which were in fact actually performed. The reason for withdrawal, doubtless, was to secure the construction of the road, but there

was no provision for restoration of the lands to their former condition in case the object failed. That was left for future consideration by Congress. In this act there is not even the provision usual in other acts granting lands for public improvements—that in case of failure to perform the conditions subsequent the lands shall revert to the United States; but the subject is not overlooked, as there is a substitute for such provision in the ninth section, which provides 'that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to ensure a speedy completion of the road.' It does not provide that the lands shall be open to sale or pre-emption in case of a failure to complete the road. The United States, by the act, has devoted these odd sections to a construction of the contemplated road, and if the grantee fails to complete it for any cause, whether incapacity to do it or otherwise, the Government reserves to itself the right to take such other action as it may, upon consideration of the circumstances, deem needful to accomplish the purpose. If the title did not pass to the intended grantee it might grant the land to other parties for performing the same service. At all events they have been devoted to that object, and withdrawn absolutely and without conditions from any other disposition. There is no provision requiring the Secretary of the Interior to issue any order withdrawing them; the act itself has that operation by its own force. The order was, doubtless, proper as a matter of information to those seeking pre-emption locations, so that they might not ignorantly or recklessly settle upon these lands in which they could acquire no rights, but it is without legal effect."

(Mr. Justice Miller in Knevals *vs.* Hyde, 20 Albany Law Journal, 371.)

"As there is no authority anywhere in the act for the Secretary of the Interior to revoke the withdrawal or restore the lands to market or subject them to pre-emption, his various orders were nullities, as he had no authority whatever to repeal or modify the act of Congress expressly withdrawing these lands from pre-emption or other disposition. Besides, his orders never took effect, for each was revoked or suspended before the time appointed for it to go into operation arrived."

Aftewards, in the same court, two other cases prosecuted by the company, one against John F. Phillips and the other against James H. Cox, were decided in the same way, and the opinion in the Orton case was adopted and filed in these cases as the basis of the judgments rendered. These cases were brought to the United States Supreme Court on writ of error, but in the absence of a brief or assignment of errors on behalf of either of the plaintiffs in error, the judgments below were affirmed December 3, 1883, Nos. 105 and 106, unreported. The ruling of the Court has thus acquired standing by repetition and acquiesence of parties interested.

Secretary Delano's decision of 1875 thus was upheld in the courts having jurisdiction of the lands, and we here respectfully cite Secretary Lamar's decision in the Wisconsin Farm Mortgage case.

The Commissioner of the Land Office denied the binding authority of the decision of the United States circuit court in that case and proposed to disregard it. The Secretary (5 Decs., at p. 92), overruling the Commissioner, said:

"Whether binding upon the department or not in the "sense you refer to, it is a decision of very high and per- "suasive authority. If the question were one of doubt the "safer rule of administrative action would lead me to accept "it as authoritative in the conduct of executive business, "and to adhere to the practice heretofore and for so many "years enforced."

The construction given to the 6th section of the act of July 27, 1866, by the United States circuit judge in California is very full and complete. He holds that the statute prohibits, so long as it is not repealed or modified, the sale, entry, or pre-emption of certain odd-numbered tracts, on

both sides of a certain line, whether they have been granted or not, whether the grantee named was qualified to take the grant or not, or whether, if qualified, he ever performed the conditions subsequent or not. In short, this section 6 is a legislative prohibition of the sale of certain lands, and as such effective, because there is no provision in the law for the restoration of the lands.

The language of the United States Supreme Court in the Buttz case is not quite so emphatic, yet it amounts to the same in substance.

The Supreme Court say that the withdrawal notice "did not add to the force of the act itself." "The law withdraws from sale or pre-emption the odd sections *to the extent of forty miles* on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of road, it is granted."

It has always been held that a reservation of land established by law, or according to a special act, can only be revoked by statutory authority.

A SPECIAL ACT OF CONGRESS IS THEREFORE NECESSARY.

In the case of the United States *vs.* Stone (2 Wallace, 525) a patent was set aside which had been issued by the Secretary of the Interior upon a sale of the land by the Land Department, the Court deciding that the premises were, at the time, withdrawn from sale, being within the military cantonment of Fort Leavenworth, the boundaries of which had been established by an Executive order. Prior to 1858 there was a statute authorizing the sale of abandoned and useless military sites (March 3, 1819, 3 Stats., 520), which was repealed by act of 12th June, 1858 (11 Stats., 336).

After the repeal, special laws were, from time to time, passed, directing the curtailment and disposal of lands that had been reserved by Executive order.

See 12 Stats., p. 70.
14 Stats., p. 573.
15 Stats., p. 123.
16 Stats., p. 275.

The disposal of the lands of a large number of military reservations therein named was provided for by a law of 24th February, 1871 (16 Stats., 430); and so other special acts were passed, until July 5, 1884, on which date an act was approved (Pamphlet Statutes, 1883–'84, page 103) providing for the disposal of the "lands or any portion of them" "within the limits of any military reservation," which are "useless for military purposes."

Military reservations of the public lands have always been established by Executive orders, but they have not been, and cannot be, restored to market and sold without some special authority given by statute.

It appears to be plain, therefore, that the reservations established under and according to the laws for the benefit of the Southern Pacific railroads in California cannot be removed and the lands restored to market without some special authority of law.

The principles thus invoked to protect the withdrawals, apply to the "branch line" of our road as well as to its main line. Both roads come under the same law of grant.

We may here refer to the letter of the Honorable Secretary of the Interior of December 10, 1886, upon the effect of this

forfeiture act. As to the odd-numbered sections within the limits of the Atlantic and Pacific route in California he said:

"They were reserved by the act making that grant, from "disposition under the general land laws, for the purpose "of aiding in the construction of the road. By the act of "forfeiture they are now taken out of that reservation and "restored to the public domain."

We can indorse this view. The lands were taken out of that reservation, but *were not taken out of the reservations for the Southern Pacific roads*, which had been previously established. It would require a statute to do that. But the forfeiture act does not name the Southern Pacific roads or grants, and is, therefore, no authority for dissolving the withdrawals.

The branch line of the Southern Pacific Company in California was located by a map, filed April 3, 1871, which was accepted by the Department, and on which a withdrawal was duly ordered.

See Appendix, Exhibit No. 5.

We claim, therefore, that in the absence of some direct authority of law *the withdrawal of granted lands* along the lines of the Southern Pacific roads cannot be revoked, or the lands restored to sale or pre-emption by an Executive order; and this proposition applies to the lands on both the main and branch lines throughout the extent of their locations. They were all withdrawn before the Atlantic and Pacific route was located.

We confidently state that never in the history of the administration of land grants have the withdrawn lands been restored to market whilst the grant was unsettled, and the company was claiming the lands.

And we cannot for a moment entertain the opinion that the present case is one in which a first experiment should be made at a time when the grant is in process of settlement; when patents have been issued for over 1,000,000 acres, and lists of half as much more land are pending for examination and patenting.

The Conflicts of Limits.

As hereinbefore stated, by the 3d and 18th sections of the act of July 27, 1866, (14 Stat., 292), a grant was made to the Southern Pacific Railroad Company of California, to aid in the construction of a railroad from San Francisco to the crossing of the Colorado river, called the main line of the Southern Pacific railroad. By the same law a grant was made to the Atlantic and Pacific Railroad Company to aid the construction of a railroad:

"Beginning at or near the town of Springfield, in the "State of Missouri, thence to the western boundary line of "said State, and thence by the most eligible railroad route as "shall be determined by said company to a point on the "Canadian river; thence to the town of Albuquerque on the "river Del Norte, and thence by the way of the Agua Frio, "or other suitable pass, to the head-waters of the Colorado "Chiquito, and thence along the thirty-fifth parallel of lati- "tude, as near as may be found most suitable for a railway "route, to the Colorado river, at such point as may be "selected by said company for crossing; thence by the most "practicable and eligible route to the Pacific."

These grants were upon similar terms and conditions.

By the 23d section of the act of 3d March, 1871, (*supra*), a grant of lands on like terms and conditions, and of the same quantity per mile, in the State of California, was made to the said Southern Pacific Railroad Company of California,

to connect its main line of road from Tehachapa Pass, by way of Los Angeles, with the Texas Pacific railroad at the crossing of the Colorada river, near Yuma.

As above stated, the main line of the Southern Pacific railroad was located January 3, 1867, and that of the branch line April 3, 1871. The line of the Atlantic and Pacific railroad in California was located by maps approved April 11th, 1872, and April 16th, 1874.

On the main line of its road the Southern Pacific railroad had a simultaneous grant with the other company. On the branch line its grant was by a subsequent law, that of 1871, but on the terms and conditions of the original act of 1866.

Both grants having been construed as grants of quantity within primary limits, with indemnity for lost lands as specified, when the Atlantic and Pacific locations were made, they exhibited a route for that road almost coincident with that of the main line of the Southern Pacific railroad for nearly 200 miles westward from the Colorado river, and which crossed the route of the Southern Pacific branch line some 30 miles north of Los Angeles. Hence all the various conflicts of the granted and the indemnity limits of the conflicting locations.

Leaving, at least for the present, a discussion of these details, we respectfully claim that—

III.

No restoration of lands withdrawn for our roads should be made, because our rights in the granted lands have vested in particular tracts, and our right to indemnity for lost lands has likewise vested as to quantity, opposite all those portions of our roads along which the conflict of limits exists. There is

no conflict of limits along the 80 miles of the main line location, which has not yet been constructed.

The road, called the main line of the Southern Pacific Company, was completed from San José to Tres Pinos, fifty and twenty-six hundredths miles, prior to, and was accepted by the President of the United States October 23, 1871; that portion from Huron to Mojave was completed prior to and accepted by the President of the United States February 13, 1878; total, two hundred and thirty-one and ninety-two hundredths miles. And the portion from Mojave to the the Colorado river, two hundred and forty-two and one-half miles in addition, was completed and reported by commissioners December 27, 1884, filed January 6, 1885, as provided in the joint resolution of June 28, 1870.

The entire branch line road, under section 23 of the act of March 3, 1871 (16 Stat., p. 579) was finally completed—three hundred and forty-six and ninety-six hundredths miles in length—prior to the time limited therefor, and the last section of one hundred and eighteen and thirty-seven hundredths miles was accepted by the President of the United States, January 23, 1878.

It is after all this has been done, and after the forfeiture act has been passed, that the question arises, what lands have been granted to the Southern Pacific Railroad Company of California, and in no way can this question be so squarely answered as by the words in the law of the grant.

The grant of lands (Sec. 3, act of July 27, 1886) was of—

" Every alternate section of public land, not mineral, des-
" ignated by odd numbers, to the amount of twenty alter-
" nate sections per mile on each side *of said railroad line, as*
" *said company may adopt*, through the territories of the
" United States, and ten alternate sections of land per mile

" on each side of said railroad whenever it passes through " any State, and whenever, on the line thereof, the United " States have full title, not reserved, sold, granted, or other- " wise appropriated, and free from pre-emption or other " claims or rights *at the time the line of said road is designated* " *by a plat thereof, filed in the office of the Commissioner of the* " *General Land Office*, and whenever, prior to said time, any " of said sections or parts of sections shall have been granted, " sold, reserved, occupied by homestead settlers or pre- " empted or otherwise disposed of, other lands shall be se- " lected by said company in lieu thereof, under the direction " of the Secretary of the Interior, in alternate sections, and " designated by odd numbers not more than ten miles be- " yond the limits of said alternate sections, and not includ- " ing the reserved numbers," &c.

By section 4 it was provided:

"And if it shall appear that twenty-five consecutive miles " of said road and telegraph line have been completed in a " good, substantial, and workmanlike manner, as in all other " respects required by this act, the commissioners shall so " report, under oath, to the President of the United States, " and patents of lands as aforesaid shall be issued to said " company, confirming to said company the right and title " to said lands situated opposite to and coterminous with " said completed section of said road." And upon verification by the commission to the President of the completion of other sections of road, "patents shall be issued to said company conveying the additional sections of land," &c.

This section was modified by the joint resolution of 28th June, 1870, (see Appendix,) which provided that on notice given to the Secretary of the Interior of the completion of a section of road, that officer should cause an examination to be made by commissioners appointed by the President, and on their report to the Secretary " that such section of said " railroad and telegraph line has been constructed as re- " quired by law, it shall be the duty of the said Secretary of " the Interior to cause patents to be issued to said company

" for the *sections of land* coterminous to each constructed sec-
" tion reported on as aforesaid, *to the extent and amount granted*
" *to said company* by the said act of July 27, 1866, expressly
" saving and reserving all the rights of actual settlers," &c.

When these provisions of law are applied to the facts just stated, it results that by the completion of the roads in sections, as provided in the law of the grant, the railroad company has acquired a right to patents for the corresponding quantity of lands, if the quantity is found within the prescribed limits, along the completed road.

THE GRANT FOR THE SOUTHERN PACIFIC MAIN LINE.

By an examination of the general provisions of the act of July 27, 1866 (and the act of March 3, 1871, is similarly conditioned), we shall find that in many respects it appears as a contract between two parties—the one to build, complete, and equip lines of railroad and telegraph, of which the other was to have the use in the manner and on the terms prescribed. The work was to be done to the satisfaction of the United States, and the compensation was to be paid in instalments as the work was completed.

The sections of the law referred to below are to be found printed in full in the Appendix, No. 1.

Looking at section 18 of the act of 1866, the relations of the parties are set forth in the usual words of a contract.

"In consideration" of the building of the road by the company "it shall have similar grants of lands," &c.

The company was to close the contract by filing, in writing, "its acceptance of the terms, conditions, and impositions of this act." (Section 12.)

This was done. The gauge of the road was to be of a certain width (section 18) and rates of fare and freight were to be arranged in a prescribed manner. (Section 18.)

The company was to commence work by a specified date, and to build fifty miles of road per year. Section 8. (This was modified to twenty miles per year. Act of July 25, 1868.)

No money was to be paid (section 3), but payment was to be made by the conveyance of land granted opposite each section of road, as fast as it was duly completed. (Section 4.)

The company was to pay the compensation of examiners appointed by the United States. (Section 4).

A specified kind of iron was to be used, and the company agreed not to charge the United States higher rates for transportation and telegraphing than were charged to individuals.

The company was not to refuse to allow other roads to connect with it.

It agreed to perform for the United States postal, military, and naval transportation, subject to such regulations as Congress might impose in respect to the charges for such service. (Section 11.)

Finally (by section 20) "the better to accomplish the object of the act," viz., the construction of the railroad and telegraph line, Congress reserved the power to alter and amend the law; and by section 9, in case of any default in the company, that should continue one year, then the United States reserved the right to annul the contract so far as uncompleted, and to place the lands in other hands, if "necessary, to insure a speedy completion of the said road."

A question was raised in 1869–1870, as to the validity of

the location of the main line; but the controversy then existing between the company and the department culminated in a legislative confirmation of the line, by joint resolution of 28 June, 1870, and thereby the then existing withdrawals of lands were sanctioned and maintained, not only for the limits of the grant (twenty miles on each side), but also for the indemnity limits, ten miles beyond.

This joint resolution confirms the company's grant on its main line to the full "extent and amount" of lands granted by the law of 1866, opposite each section of completed road. It will be found printed in the Appendix, No. 2.

No attempt has ever been made in the Land Department to disturb the grant and withdrawal on this main line of road, since this confirmatory joint resolution of 1870. And although attempts, repeated attempts, have been made in the courts, to call in question this location and withdrawal, they have signally failed. The Orton decision has stood as a correct exposition of these laws since the year 1879, in which it was made.

There is, however, another fact worthy of mention. It is this:

Secretary Delano, having before him the matter of the conflict of the grants claimed by the Southern Pacific Company and the Atlantic and Pacific Company along the lines of the latter, from the west line of Los Angeles county to the Colorado river, which includes the entire conflict between the limits of the grants, decided on the 15th of April, 1874, that the Southern Pacific Company *had the prior and better right* to the lands along its line, to the exclusion of the Atlantic and Pacific Company, citing the above-mentioned joint resolution as confirming the claim of the Southern Pacific Railroad Company.

On the 16th April, the day after this decision, he approved the map of the line of the Atlantic and Pacific Railroad Company along the portion of its road stated, thus practically making his approval subordinate to and conditional upon the recognition of the better right of the Southern Pacific Company to the lands it claimed which he had declared on the preceding day. See decision in Copp's L. O. for 1878, vol. 4, p. 147, adopting that of Assistant Attorney General Smith (p. 149), in which that officer said:

"The joint resolution of June 28th, 1870, is, however, "material when we consider the question whether the land "grant of the Southern Pacific is affected by the present "location of the Atlantic and Pacific. The former was located "by said joint resolution, which was long before the location "of the latter, and, therefore, by a well-settled rule in your "department, *will be entitled to the lands where they may over-* "*lap*, and cannot be injuriously affected in its right to the "lands given to aid in its construction."

It is also an important fact, *that under this decision* the railroad of the *Southern Pacific main line was built.* It is also true that the decision quoted stands to-day unchanged in the Department, as the decision upon that conflict and upon the legal effect of the joint resolution, and so stood on the 6th July, 1886.

It is in the nature of a judgment of a court of last resort, and is binding upon the parties and their privies in the same jurisdiction, though the interpretation of similar statutes has recently been changed.

The Atlantic and Pacific Company acquiesced in it. Though we regard it as of the first importance that a decision upon the conflict of the main line road was made in our favor in 1874, and that the road has been constructed

under that decision, which has never been changed, yet we confidently claim that at this time the Department of the Interior is under obligation to recognize our right to all the lands of our grants—both granted and indemnity lands—because—

Our lines of railroad and telegraph opposite them had been fully completed prior to the date of the forfeiture act.

It is impossible to find any words in the law that limit our grants to less than twenty sections per mile, unless the grants are cut short (as we concede they will be) by the thirty-mile limits for the indemnity lands, and the exceptions made by the terms of the grant.

We are conscious that in making the above claim for our branch line road we are encountering the opinion of Assistant Attorney General Montgomery, that *all* the odd-numbered sections within the limits of the Texas Pacific location were granted to that company, and that the proviso in section 23 of the act of March 3, 1871, that the grant thereby "shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company," excluded the Southern Pacific grant from taking effect within any limits which might result by the location of the Texas Pacific line. (4 Decisions, 215.)

We understand that opinion as based upon an axiom of interpretation which we deem erroneous, viz., that in "a statute granting lands every intendment must be taken most strongly against the grantee." The error grew out of the application of this erroneous principle, and that it is erroneous we propose to show.

But, first, we remark that the opinion just referred to

does not reach the principal conflict of the Atlantic and Pacific limits with the limits of our main line.

There is no such proviso as that to our first grant. Our grant there is simultaneous, and on a full equality with the other; and the question raised by the Commissioner's letter is whether our company has or has not a right to all the land.

OUR COMPANY HAS ACQUIRED ALL LANDS IT NOW CLAIMS.

We claim, as to our main line, that, having constructed the road opposite, we have acquired the corresponding lands granted in both limits; therefore, *none of them can now be sold by the United States.*

In support of this proposition we refer to numerous decisions of the United States Supreme Court.

The case of Sioux City and St. Paul Company *vs.* Chicago and St. Paul Company (117 U. S. Reps., 406) was one where the controversy arose under the same grant, and both parties had completed their railroads. It was decided March 29, 1886.

The Court said (p. 407):

"The roads to be benefited by this grant *have both been completed, and both companies are entitled to the odd sections within ten miles of their lines of road,* and to the indemnity lands, so far as they can be found in odd numbers, within twenty miles; but as the roads cross each other their limits also cross and overlap, and the claims to the odd sections conflict." * * *

At page 408:

"The title acquired from the United States relates back to the date of the grant, and neither company can obtain any superiority of title by any act done by it, or by any

" omission to act by the other, *provided there is no forfeiture* " *of the grant.*

" This principle is fully decided in the case of Sioux City " and St. Paul Company *vs.* Winona and St. Peter Company " (112 U. S. Rep., 720). In such cases the companies take the lands coming within the conflicting lines in equal " moieties."

Had there been a forfeiture of one of the grants, the implication is that the company that fulfilled the law would take all the land.

* * * The Court say further:

" But no title to indemnity lands was vested until a se- " lection was made by which they were pointed out and " ascertained, and the selection affirmed by the Secretary of " the Interior." " In a case, therefore, where two companies " had this right of selection within the same limits, priority " of right might be created by priority of selection, &c." (P. 408.)

As to the lands common to the granted limits of both roads, the Court said:

" That part of the decree, therefore, which divides the " lands equally, and directs the Commissioners to make par- " tition of them, is also affirmed."

As thus expounded the rule is evidently one arising from the fact that *both companies had completed their roads, and, as against the United States, had acquired the right to all*, and, as their rights were equal, partition became necessary.

It does not seem necessary to discuss the prior decisions of the same Court, some of which were referred to in this one, but it may be remarked that it appears in all the cases reported, that the successful party, and in most of them both of the parties, *had completed the road opposite the land in controversy* before instituting suit.

This was the case in Buttz *vs.* The Northern Pacific, 119 U. S. Rep., p. 55.

Also, Missouri, Kansas and Texas Company *vs.* Kansas Pacific Company, 97 U. S. Rep. p. 491.

Van Wyck *vs.* Knevals, 106 U. S. Rep., p. 360.

Kansas Pacific Company *vs.* Atchison, Topeka and Santa Fe Company, 112 U. S. Rep., p. 414.

Sioux City and St. Paul *vs.* Winona Co., 112 U. S. Rep., p. 720.

Kansas Pacific Company *vs.* Dunmeyer, 113 U. S. Rep., p. 629.

Walden *vs.* Knevals, 114 U. S. Rep., p. 373.

In expounding the Union Pacific railroad grant, 112 U. S. Rep., p. 422, the Court say:

"The Kansas Pacific Railway Company, under the acts of "Congress of 1862 and 1864, by a compliance with their "provisions *in the construction of its road, acquired the title to the "lands in controversy, and has accordingly a right to record evi-"dence of it in the form of a patent.*"

The Kansas Pacific Company had not obtained a patent, but evidence of title had been issued by the Land Department to the other party to the suit.

The record showed the acceptance by the President of the United States, in Jan., 1867, of twenty-five miles of completed road of the Kansas Pacific Company, opposite the lands in contest, and was silent as to the other parts of the entire road.

In the case of Kansas Pacific Railway Company *vs.* Dunmeyer, the record showed exactly the same state of facts; that is, the location of the line in 1866 and the completion

of 25 miles of road in 1867, and the court said (p. 641): "*The company had no absolute right until the road was built on "that part of it which came through the land in question.*"

Here it is said that the completion of the section of road gives *absolute right* to the lands granted opposite it, this quotation being, in substance, the same as that above from 112 U. S. Rep., p. 422.

In the case of Van Wyck *vs.* Knevals, *supra,* the case was one of the location and completion of the section of road opposite, but it was alleged by the other party "that the com-"pany never completed the construction of the entire road "for which the grant was made." (p. 368).

In reply to this the Court say:

"Assuming that the company's proposed road was not en-"tirely completed, the fact remains that the company *con-"structed a portion of the road, and that portion was accepted as "completed in the manner required by the act of Congress.*"

The land in controversy being opposite a completed portion of road, the court held the title under the railroad grant to be complete, though a patent had been issued to the opposing party, which was issued upon a sale of the land made after the definite location of the road. No patent had issued to the railroad company under its grant.

The case of Walden *vs.* Knevals (*supra*) was exactly similar.

In Missouri, Kansas and Texas Company *vs.* Kansas Pacific Company (*supra*), likewise, the record shows the location and completion according to law of the section or part of the road opposite the lands in controversy.

In all these cases the provisions in the law of grant were similar to those in the case of the Southern Pacific Railroad

Company, section 4 (Appendix); that is, the companies were entitled to have, and did have, their roads completed in sections and reported to the Secretary of the Interior.

These decisions go at least thus far, that *under these circumstances the executive officers have no right to sell the lands or convey them to any other applicant.*

As to all the lands of the Southern Pacific Company, along both its lines, so far as involved in this inquiry, the company has completed its roads, and had them duly reported in sections, and has fully complied with the conditions of the grants. Thereby it has acquired title to all lands within the granted limits, and to indemnity for such as cannot be conveyed, because of the exceptions named in the terms of the grant, and is now entitled to patents as provided for in the joint resolution of 1870.

In 12 Opinions, p. 254, Attorney-General Stanbery said:

"It has again and again been decided that a title vested " by statute is just as complete as one vested by the issuance " of a patent, and in this case, the title being so vested prior " to the patent, the only office of the patent is to afford the " party more convenient evidence in establishing his rights " when brought in contest."

See Stark *vs.* Starrs, 6th Wallace, 402, where it is said:

"The right to a patent once vested is equivalent, as re- " spects the Government dealing with the public lands, to a " patent issued."

This is confirmed in Barney *vs.* Dolph, 97 U. S. Rep., 652 at p. 656. See also, Wirth *vs.* Branson, 98 U. S. Rep., 118, where it is decided that "a party who has complied with all " the terms and conditions which entitle him to a patent for " the particular tract of public land, acquires a vested inter-

"est therein, and is to be regarded as the equitable owner "thereof."

This doctrine has lately been recognized by a decision of the Secretary. (5 Land Decisions, p. 38–39.)

And if the right to the patent is absolute, the title in the company is irrevocable, even by an act of Congress.

Fletcher *vs.* Peck, 6 Cranch, p. 87.
Terrett *vs.* Taylor, 9 Cranch, p. 43.
Wilkinson *vs.* Leland, 2 Peters, p. 627.

It appears from the decisions just cited that the Government cannot sell and convey these lands of the Southern Pacific Company's grant to other applicants. This being the case, they ought not to be restored to market by a notice which would prove to be only a trap and a deception to honest settlers, and possibly lay the foundation for a heavy bill of expense to the United States. We notice that a bill has recently passed the U. S. Senate (January 11, 1887), to pay to parties in Kansas and Nebraska, $3 50 per acre for lands sold to them by the United States, within the limits of the grant to the St. Jo and Denver, otherwise the Northern Kansas Railroad Company, by act of 1866. The bill appropriates a sum not exceeding $250,000. (Congressional Record, pp. 549, '50, '51.)

But the Atlantic and Pacific Company did not fulfil the conditions of its grant. All it did under the law was to file a map to designate the route of *a railroad it then intended to build, and the lands it then intended to acquire,* but which it never has acquired, because it has never built the railroad.

The mere withdrawal of the land for that company did not affect the title of the lands in the United States.

"The order of the withdrawal of lands along the probable "lines of the defendant's road, made on the 19th March, "1863, affected no rights which, without it, would have been "acquired to the lands, nor in any respect controlled the "subsequent grant."

Kansas Pacific *vs.* Atchison &c., R. R., 112 U. S. Rep., at p. 422.

The case of the Kansas City, &c., R. R. Co. *vs.* The Attorney General (118 U.S. Rep., 682), we claim as an authority that indemnity lands, common to the indemnity limits of two railroads claiming under the same grant, are properly certified for the benefit of the company which has built its road.

The lands in controversy were odd-numbered sections within "the overlapping indemnity limits of the grants (by "act 3d March, 1863) for the L. L. & G. Railroad Company "and the Mo. Kan. and Texas Railway Company," and were certified to the State of Kansas, April 10, 1873, under said act for the M. K. & T. Company, which had built its railroad opposite the lands.

The Commissioner of the Land Office, March 11, 1882, in his report to the Secretary of the Interior, said: "I am of "the opinion that the certification of the lands in the odd-"numbered sections within the overlapping indemnity "limits east of the L. L. & G. Railroad was erroneous, and "accordingly recommend the institution of the suit in the "name of the United States to set aside the company's title "to this particular class of lands."

In reference to these same lands Secretary Schurz, in a letter to Hon. D. C. Haskell, May 15, 1878, said: "As the "M. K. & T. road was entitled to indemnity for lands lost "in place to the full amount of the lands so selected, and

" the selections were made of lands that had been reserved " for indemnity purposes for said road, I am of the opinion " that there is no defect in the title of the railroad com- " pany."

But a technical construction of the laws was insisted on in 1882, and suit instituted early in 1883 by the Attorney General.

When the case reached the United States Supreme Court the technical construction of the Government officials was discarded, though a very able and learned effort was made by special counsel, uniting with the Attorney General, in behalf of the United States.

The principal point made by the United States was that the lands were appropriated by the grant for another road; that Congress had provided for two roads. But the Court held that upon examination of all the statutes they were satisfied that Congress intended to have *but one road*, and to consolidate the grants in aid of that one.

The Court pronounced the interpretation claimed by the United States to be a "strained construction." They said Congress knew all the existing facts in 1866, and that it was more "reasonable" to hold that Congress intended by the act passed in that year to *ratify* the rights of the Mo. Kan. & Texas Company to the lands for the purpose of building that road. (Page 691.)

Here the Court considered the whole case and the whole law and adopted a "reasonable construction" to promote the intention of Congress to have one road built, and to aid that one road by the grants.

Through the certified list and the conveyance of the lands from the State, the Court held that the company "acquired

" the real ownership and equitable interest in the lands " *which it had earned by building the road* in accordance with " provisions of all the statutes," &c.

The fact that they were within the indemnity limits of another road located under the same grant was not noticed by the Court as affecting the validity of the right of one company to the whole.

The issue, whether or not the land had been earned by building the road, was decided in favor of the company and against the United States.

This appears to us to be a case like our own. We find that our grant was made and located, the location was confirmed by Congress, and the road built as required by the statutes. We, therefore, have the equitable ownership of all the lands of our grants, which the United States cannot successfully question, and we are entitled to the patents which the law directs to be issued. The United States cannot deny us the full benefit of compliance with the law on the ground that under a simultaneous grant for building another road it was once possible for another company, which did not build a road, to have complied with the law and acquired a part of the lands or a part interest in some of them.

This decision certainly supports our claim to all the lands as against a simultaneous grantee who does not build a railroad. And in the nature of the case, we see no difference between such a case and that where *a prior grantee fails to build, and a subsequent grantee builds, a railroad* in the manner and upon the terms and conditions of its grant.

The United States can take nothing from the Southern Pacific Company by the failure of the Atlantic and Pacific Company to build its railroad. This, we think, is settled in the recent case just cited.

The justice and propriety of the views expressed by the court as the true construction, is apparent by reference to the terms and conditions expressed and the order of events mentioned in the law of grant, thus: 1st, the grant; 2d, the acceptance thereof; 3d, the filing of a map of route; 4th, adoption of gauge; 5th, beginning of construction and progress of work; 6th, completion of road to the standard required, ready for the contemplated service; 7th, performance of transportation of United States mails, United States troops, civil officers, and employés, and military and naval equipments, stores, etc.

The grant is "to aid construction," and until construction no service can be rendered to the Government, none to the people. The acceptance by the company, the filing of a map of route, the fixing of a gauge, are of no use except as preliminaries; they are not even a part of the actual work of building, and the company that has never begun to build has never begun to acquire title to granted lands. The location of route only designates the lands which it might obtain by construction and equipment.

And if there be two or more grantees who fulfil the law, then the Government and the people have the advantage of transportation over all the lines. If one builds its road, the Government and the people have all the benefit proposed to be secured by that road, and the company obtains, on its part, all the proffered grant.

There never was a grant of a moiety of the lands along a line to one company for its road, and another moiety to another company for another road. In such a case the com-

pany fulfilling the law could never get, and the company failing and forfeiting never lose, more than the moiety granted. After the forfeiture in such a case the Government might have something remaining to it, but not where, as in the present case, the whole has been granted and the conditions of that grant have been completed.

It is also true that where a company having a prior grant fails to build, and thereby forfeits, and a subsequent grantee fulfils the conditions of a subsequent grant, there is no obstacle to recognizing the right of the company that builds the road. It is plainly the intention of Congress that the latter should have the promised compensation. An existing withdrawal for another grantee is no obstacle to the grant of a title by a subsequent law. (Kansas Pacific Co. *vs.* Atchison, Topeka and Santa Fe Co., 112 U. S. Rep., 414.) And when making a subsequent grant for a road along the line of a prior grant, Congress must be supposed to have acted intelligently, and to have had in view a probable forfeiture by the first grantee.

The common sense of the common people asserts that useful work performed is entitled to wages promised. For so much railroad built and prepared for the required service so much land is pledged. This principle has been recognized as applicable to railroads claiming under grants. In the last session of the 48th Congress, speaking of our Branch line road, Senator Morgan said (Rec., p. 2097):

"The Southern Pacific Railroad Company built their "road down to Yuma in time *to earn all their land grant.* "* * * They earned the land grant to Yuma."

Construction of the designated road is the basis of the decisions of the United States Supreme Court hereinbefore

referred to. The Court treats it *as the completion of the title*, of which the grant by Congress is the foundation.

Here it is worthy of notice that in the recent act of July 10, 1886, "to provide for the taxation of railroad-grant lands," Congress did not treat any company as the owner of lands which had done nothing more than to file a map of definite location, but provided "that this act shall apply "only to lands opposite to and coterminous with the com- "pleted portions of said road."

This act conforms thus to the judicial decisions which make the construction of the road a necessary antecedent of acquiring full title to granted lands, and these views are entirely consistent with the decisions which fix the definite location of route by filing a proper map, as the act done, which designates and segregates from the public lands those tracts that are subject to the grant and those that are excepted from it. They are then set apart as the property offered in compensation for the building of the railroad.

The primary object and purpose of the grant of lands, the Court said in the Platt case, was *to aid the company in building a railroad*, and this is expressed in the titles of the laws making the grants to our company. It is repeated in the 18th section of the act of 27th July, 1866, in the words: "And in consideration thereof"—(that is, building the railroad and telegraph) "*and to aid in its construction shall have similar grants of land.*"

The great and controlling end and object is the construction of the railroad. The company that builds its road according to law fulfills the substance of the work it is to do, and is entitled to the substance of its compensation. The company that does not build its road, does not become the beneficiary

of a grant, and so the United States Supreme Court holds in the cases of Cedar Rapids Railroad Company *vs.* Herring and others (110 U. S. Rep., p. 27). In these cases it appeared that the company made a location on one route; afterwards changed the line and built another road. Held, in substance, that they were not entitled to land on a line located but never constructed; that the land granted was ascertained by the line constructed.

The forfeiture act of 1886 is in full harmony with this principle. On the line of the Atlantic and Pacific, *where road had been built*, no forfeiture was declared. The forfeiture was only of lands along uncompleted portions of road. The Congressional tribunal, sitting in judgment on the case, did not mention any penalty for failures to do other things as required, but condensed all the faults of the delinquent company into the one charge—that of failure to build the road.

It is true that for this proposed but unconstructed road of the Atlantic and Pacific Company there was a grant simultaneous with the grant for our main line and prior in date to the grant for our branch line, and our branch line grant was, therefore, made so as to "in no way affect or impair the "rights, present or prospective, of the Atlantic and Pacific "Railroad Company." This protected a prior grant as against a subsequent one where the rights of the companies came in collision, but there can be no collision so long as the Atlantic and Pacific Company has built no road. Our company has never impaired the rights of that company. It is not our fault that they have never acquired and cannot now acquire title to any lands in California. This limitation is now as inoperative as the grant is upon the forfeited lands.

There are no rights, present or prospective, in the Atlantic and Pacific Company in the lands earned by our company.

When we demand all the lands of our grants, shall we be told by the United States that we shall not have them because the Atlantic and Pacific might have earned some of them, *but did not?* Ah! did not; and, if not, then why did not our company earn them under its subsequent grant? Can it be found that we failed to comply when they failed—that we sinned in Adam's transgression?

We may here say that neither party to the contract of grant had any such absurd intentions, "uttered or unexpressed," when the law was enacted. The Secretary of the Interior, upon the filing of our maps, immediately withdrew all our lands, practically saying: "This you shall have for building the roads." We accepted the grants and built the roads under this construction of the grants.

Now, it is also a familiar principle, applicable in courts in interpreting contracts, that a reasonable construction, adopted and acted upon for years by both parties to a contract, will not be changed so as to affect what has been done by them under this construction.

THE TEXAS PACIFIC CASE NOT A PRECEDENT.

We here claim that the action of the Department, in the matter of conflict between the Texas Pacific grant and the Southern Pacific branch road, of November 2, 1885, should not be regarded as a precedent in this matter. The forfeiture acts are essentially different. In that case there was declared *a forfeiture of all the lands granted. In this there is a recognition of the company's rights to all those opposite completed road.*

In the present case, also, the forfeiture is further restricted to lands on "the uncompleted portion of *the main line* of road." There is no forfeiture proposed as to the branch roads, whether completed or not. We understand that the Van Buren branch of the Atlantic and Pacific road has not been completed, and by a fair construction of the laws the Southern Pacific main line is also a branch of the Atlantic and Pacific within the intendment of the act of 1866 and under the general practice of the Land Office.

In the matter of the restoration under the Texas Pacific forfeiture act (4 Land Dec's, 215) it was held that, to give effect to the 9th section of the act of March 3, 1871, the proviso to the 23d section must be construed as excluding from the grant to the Southern Pacific line all lands falling within the Texas Pacific limits.

The rule that "every intendment" of the statutes "must be taken most strongly against the grantee and in favor of the Government" was applied. That rule, we think, as applicable to grants similar to ours, is not sustained by the decisions of the United States Supreme Court. A reasonable interpretation, in view of the object of the grants and to fulfill the intention of Congress to aid, by grants of lands, the construction of railroads, is the rule of the Court. The statutes (say the Court) are laws as well as grants. The erroneous rule applied to the case, we think, led to an erroneous conclusion, and it may be said that, whether it be on account of the inferior quality of the land involved, or the public doubt of the correctness of the conclusion in that case, or both (as we are credibly informed), the Government *has not sold any of the lands restored to market in accordance with that decision of the Department.*

But we confidently claim that the rule that "every intendment" of the statutes "must be taken most strongly against the grantee, and in favor of the Government," does not apply to the statutes making grants of land to the Southern Pacific Railroad Company, but a reasonble interpretation, giving effect to the intention of Congress, should be applied, keeping in view the main purpose of Congress, to aid the construction of the designated roads. (118 U. S. Rep. 682.)

It is true that the U. S. Supreme Court, in dealing with the Des Moines river grant to Iowa, of August 8, 1846, (9th Stat., p. 77) held that a rule of strict construction in favor of the grantor and against the grantee, must be adopted in that case. The case was widely different from ours. The Court there was determining the meaning of a clause in the grant, which had been differently construed by different officers of the Government of high official position and great legal learning. It was cleaving a Gordian knot, and to resolve the doubt arising from ambiguous words of grant readily admitting of two different meanings, found that the grantor was entitled to the benefit of the doubt. (Dubuque and Pacific Co. *vs.* Litchfield, 23 Howard, 66.)

The question for solution was, whether or not the lands then in contest were comprehended within the true intent and meaning of doubtful and ambiguous words of grant. But, in our case, the words of grant are plain, and they mean and apply to the lands in controversy; and the question is raised whether doubtful and ambiguous words in a proviso defeat plain words of grant. If the rule of strict construction applies, it applies to the proviso—not to the grant.

The language of the Des Moines decision was quoted by the Court, in the subsequent case of L. L. & G. R. R. Co. *vs.* the U. S., 92 U. S., Rep. 733. But in fact, the Court then proceeded to distinguish the case under decision from the former case, and said, that the grant under consideration " does not " extend beyond the intent expressed." " It should be neither " enlarged by ingenious reasoning, nor diminished by " strained construction. The interpretation must be reason- " able, and such as will give effect to the intention of Con- " gress. This is to be ascertained from the terms employed, " the situation of the parties, and the nature of the grant. " If these words are plain and unambiguous, there can be " no difficulty in interpreting them."

These expressions of the rule for interpretation are not in conflict with our claims for the Southern Pacific Railroad Company in this paper. We insist on such interpretation as " will give effect to the intention of Congress."

The lands to which its grants apply were public lands when the grants were made, and there is no ambiguity in the terms of grant, or description of the lands granted.

THE INTENTION OF CONGRESS IN THE PREMISES.

We can stand upon *the intention of Congress when the grant was made*, and adopt the proposition that "the interpretation must be reasonable," and the grant should not be enlarged by *ingenious reasoning* or " diminished by strained construction."

In Missouri, Kansas & Texas Co. *vs.* The Kansas Pacific Co., 97 U. S. Rep's, at p. 497, speaking of the grant to the last-mentioned company, the Court said:

" As to the intent of Congress in the grant to the plaintiff " there can be no reasonable doubt. It was to aid in the

" construction of the road by a gift of lands along its route, " without reservation of rights, except such as were specially " mentioned."

In that case the Court did not allow any inference to be made to diminish the quantity of the lands, against the effect of the words of grant. The only reduction that could be made was the result of the *exceptions specially mentioned.* The more granted land the more aid for construction, and as aid to construction is the main object, the grant must be construed in the light of *a purpose to aid to the usual extent,* where there are no words to import another intention. In aid of construction the grant is intended to carry all land fairly coming within the words used to describe the lands.

The theory of construing these grants in the manner most favorable to the United States and most unfavorable to the companies, has some times been adopted by the executive officers, but the Supreme Court has established the rule of a *reasonable construction* to give effect to the intention of Congress.

This rule of reasonable construction breathes in every line of the late decisions of the U. S. Supreme Court in Buttz *vs.* The Northern Pacific Railroad Company, hereinbefore cited, and in the Kansas City, Lawrence and Southern Kansas Company *vs.* the United States, 118 U. S. Rep., 682.

In the last-named case the United States adopted a technical construction of the laws, most favorable to the interests of the Government and against the interests of its grantees, and, therefore, the suit was instituted. But the U. S. Supreme Court unanimously applied the meaning and inten-

tion of the grant, by a reasonable construction, as controlling the case in favor of the rights of the railroad company.

See also United States *vs.* U. P. R. R. Co., 91 U. S. Rep., p. 72; see also Platt *vs.* U. P. R. R. Co., 99 U. S. Rep., p. 48; the Sinking Fund cases, 99 U. S. Report, p. 700 at 719.

In the case in 91st U. S. Reports, the Court took into view the entire scheme of the grant and the condition of public affairs at and before the passage of the act, in reaching an interpretation of the intention of Congress.

In the Platt case the Attorney General interfered on behalf of the United States and made an argument in support of a strict cosntruction and a corresponding ruling that had then recently been made by the Secretary of the Interior in the Dudymott case; but the Court held that the primary object of the Union Pacific land grant was to give aid to the company "*in and during the construction of its road,*" and the provisions of the act making the grant of lands were to be interpreted so as to conform to that primary intention. The ruling of the Secretary of the Interior was accordingly reversed.

We call attention to the subjoined paragraph, 99 U. S. Rep., p. 60:

"We do not say that other incidental considerations were "not kept in mind, but what we do assert, as plainly mani- "fest in the legislation, is that the *paramount intention* of "Congress was to give such assistance to the company as to "induce them to build the road. *Every other consideration* "*was subordinate to that.*

"All will concede that in construing the act of 1862 we are "to look at the state of things then existing, and, in the "light then appearing, seek for the purposes and objects of "Congress in using the language it did; and we are to give

"such construction to that language, if possible, as will "carry out the congressional intentions. *For what particular "purpose, then, was the grant of lands made?* The statute "itself answers, 'for the purpose of aiding in the construc- "tion of the railroad and telegraph line' and securing gov- "ernmental transportation.

"The lands were granted to be used in furtherance of such "construction. But Congress and the grantees must have "known that when granted the lands were of little worth. "They were unsalable at any price. Their value was "wholly prospective, dependent upon the construction of the "road."

Every word of this quotation is directly applicable to this case of the Southern Pacific Railroad Company.

In the Sinking-Fund cases, although the court sustained the constitutionality of the Thurman sinking-fund act, they said (the Chief Justice pronouncing the opinion). The United States—

"Cannot legislate back to themselves without making com- "pensation for the lands they have given this corporation "to aid in the construction of its railroad; neither can they "by legislation compel the corporation to discharge its obli- "gation in respect to the subsidy lands otherwise than ac- "cording to the terms of the contract already made in that "connection. The United States are as much bound by "their contracts as are individuals. If they repudiate their "obligations it is as much repudiation, with all the wrong "and reproach that term implies, as it would be if the repu- "diation had been by a State, or a municipality, or a citizen. "No change can be made in the title created by the grant "of the lands or in the contract for the subsidy bonds with- "out the consent of the corporation. All this is indis- "putable."

99 U. S. Reports, at p. 719.

The Southern Pacific Company of California has fulfilled the great condition of completing its roads and telegraphs

opposite the lands in contest, and become entitled to its lands by a contract, which the Government cannot repudiate. This is clear as to all the lands along its main line.

THE GRANT FOR THE BRANCH LINE.

As to the lands along the Branch line road, we contend that in the presence of the forfeiture of a prior grant, the proviso attached to the 23d section of the act of 1871, by a fair interpretation, does not except the lands in conflict from the effect of the grant. The opinion of the Assistant Attorney General of November, 1885, was that the proviso had the effect to except the lands forfeited by the Texas Pacific Company from the grant to the Southern Pacific Branch line road.

It is worthy of notice that since the date of that opinion, November, 1885, the opinions of the Supreme Court have been pronounced and published in three important cases.

117 U. S. Rep., 406, decided March 29, 1886.
118 U. S. Rep., 682, decided November 8, 1886.
119 U. S. Rep., 55, decided November 15, 1886.

These cases materially change the theory of interpretation adopted in November, 1885, by the Assistant Attorney General.

He suggested a doubt of the proposition that the branch line road had received a grant "or could demand an acre of the land originally intended to be granted," because it could not connect with the *Texas Pacific road* at the crossing of the Colorado river. But *it did build its road, on a line approved by the Department of the Interior*, to the point designated in

the law of March 3, 1871, for a crossing of the Colorado river, and the fact now is that it there made a connection with another railroad, the assignee of the Texas Pacific Company, and established a connection of the city of San Francisco with the through line to New Orleans, thus fulfilling the purpose of the grant as stated by Congress. Moreover, in the case of the Kansas City, Lawrence and Southern Kansas Company (118 U. S. Rep., at p. 693), the Court overruled the contention of the United States that the grant failed because the road claiming the land had not built to a junction with another railroad *at the exact point designated in the law*, but to a point eight or ten miles therefrom. The court said this contention gave "*too narrow* a construction" of the language of the statute. They also said that the "grant of lands would not be defeated if the other road did "not build into the valley of the Neosho river at all, and "yet, if the strict and literal construction of the phrase— "where the road enters the valley—should be adopted, that "would be the effect upon the grant."

This doctrine of the United States Supreme Court would secure the grant to our branch line if it did not connect with a railroad crossing the Colorado at the designated point. But it does connect, only the other railroad, an assignee of the Texas Pacific, is not called the Texas Pacific, though built along the line thereof and effecting a great southern through line of transportation, which was the main object of Congress in making a grant to the Texas Pacific Company.

But these cases also establish the rule of a reasonable construction to meet the substantial intention expressed by Congress, without narrowness, straining, or construing "every

intendment of the granting statute most strongly against the grantee, and in favor of the Government."

We come now to the 23d section of the act of 1871:

"SEC. 23. That *for the purpose of connecting the Texas Pacific "railroad with the city of San Francisco*, the Southern Pacific "Railroad Company of California is hereby authorized (sub- "ject to the laws of California) to construct a line of railroad "from a point at or near Tehachapa Pass, by way of Los "Angeles, to the Texas Pacific railroad, at or near the Col- "orado river, with the same rights, grants, and privileges, "and subject to the same limitations, restrictions, and con- "ditions as were granted to said Southern Pacific Railroad "Company of California by the act of July 27, 1866. *Pro- "vided, however*, That this section shall in no way affect or "impair the rights, present or prospective, of the Atlantic "and Pacific Railroad Company, or any other railroad com- "pany."

Approved March 3, 1871.

This section, in effect, as to this line of road and its construction, the aid given therefor by the United States, and the conditions imposed upon the company, repeats the law of 1866, substituting in sections 3, 4, &c., the "Southern Pacific Railroad Company of California," instead of the Atlantic and Pacific Railroad Company. (Case of H. J. Dull, 10 Sawyer's Reps., 506.)

By section 3 it is enacted that there be and is hereby granted, &c., ten alternate sections of *land* per mile, on the line thereof, &c.

The 23d section gave the same rights, *grants*, and privileges, with a proviso that the donation shall not impair the *rights* of the Atlantic and Pacific Company. "Grants" are not mentioned in the proviso. That was not necessary, for as to land the Atlantic and Pacific had a prior grant, on

compliance with which that company might have taken title to land. The proviso does not make *the grant of land* subject to the land grant to the other company, and *therefore, the lands are not affected* by the proviso. They stand on the force of the respective grants. It is more consistent with the intention and policy of Congress to infer that no exception from the terms offered to one company was intended, if the other should never build a road. No exception of that kind is expressed, and the offers to the two companies were upon an entire equality.

That a few grants had been made under which no roads were built was a fact known to Congress, and it did not intend to deprive our company of all inducement to build its road, with the certainty before it that it could not thereby have its corresponding quota of land; but intended to leave the subsequent grantee to the chances of acquiring the land if the first grantee did not. For the chances were even then quite good. In March, 1871, the Atlantic and Pacific Company had located its line for only about 75 miles in the State of Missouri, whilst the Southern Pacific had located the whole of its main line, had the location confirmed by the joint resolution of 28th June, 1870, and had completed 30 miles of its road.

We intended to do something. It was clear that the other company was doing nothing commensurate with the greatness of the enterprise entrusted to it. There was reason, therefore, for the policy of Congrees, manifest on the surface of the acts, to offer the lands in California to the branch line road for its construction in case the first grant should not be effectual; and we have shown from the decisions of the U. S. Supreme Court herein cited, that the grant does

not bestow title or the right to a patent until the road has been built. The title to the land remains in the United States, subject to appropriation by the subsequent grantee who fulfills the law.

We repeat that in section 23 of the act of 1871, grants were made to us, and *if lands had been excepted from grants* (not under section 3, but by the proviso to section 23), they ought to have been, *and would have been named.* The proviso is silent as to the "*grant*" to the other company, but saves its "rights." And here the forfeiture act of July 6, 1886, fits in, and continues to that company its most important "rights," but forfeits its *land grant* along uncompleted portions of road.

The word "rights," by fair intendment, does not include a land grant, especially where it is in close conjunction with the word "grants"—the grants being made, however, to our company, and the "rights" saved to the other.

Some of the rights of that company, on March 3, 1871, were to locate its line, to build it, and to acquire lands opposite constructed road. These rights it has enjoyed in great part, but whatever else it may now do in California, consistently with the forfeiture act, it can no longer acquire lands by building its road there. The forfeiture act has set aside its land grant in that locality, and there is now no obstacle in the proviso to section 23, to the full adjustment of the land grant thereby made to our company.

But here we remark that however the Department may now deal with the various questions of ultimate right secured to our company by building the branch line road, this 23d section makes the 6th section of the act of 23d July, 1866, applicable to said branch line road, and that said road had

been located and the location approved by the Secretary of the Interior, and the maps of the withdrawn limits filed in the local land office, so that the withdrawal to the twenty and thirty-mile limit had been established, before a location was made by the other company.

The withdrawal taking effect by statute cannot be revoked in the absence of statutory authority, as shown in the first part of this brief.

It is plain that this 23d section of the act of 1871, has made a grant of lands along a route geographically ascertained by the location and building of a railroad.

If the proviso excepts *lands* from the grant, the exception ought to be within the words and meaning of the proviso. If the grant may well be sustained, so that the proviso does not disturb it, that construction should be adopted.

In Ryan *vs.* Carter, 93 U. S. Reps., p. 78, at p. 83, the United States Supreme Court said :

" But this exception is not within the reason of the pro-
" viso, and the Court is at liberty to adopt another construc-
" tion, if it may be fairly done, by giving full and just effect
" to the words used.

" The general rule of law is, that a proviso carves special
" exceptions only out of the body of the act, and those who
" set up any such exception must establish it as being within
" the words as well as the reason thereof."

United States *vs.* Dickson, 15 Pet., 165.

" Why should Congress wish to exclude Dodier's title, if
" it did not conflict with any other, and was embraced by
" the general words of the statute."

The course of reasoning by the Court in this case sustains our position that "lands" not being named in the proviso to the 23d section of the act of 1871, are not affected by it.

The words of the proviso may well have full and fair meaning without construing them in a way to impair our land grant. If they affect our grant, how then? They would cause our grant to be rough and jagged on the edges, to almost disappear in some places, and then appear in others; though the law has made it on the line of a railroad, with limits equi-distant on both sides of the road, and has increased the price of all even sections, for like equal distance, because alternate to granted ones.

The entire theory of railroad land grants, and the practice of fifty years by Congress, are inconsistent with the making of a land grant, by the law, in such a shape and form as ours would appear, if lands withdrawn for the other company are exempted from our grant. As our grant was first located there would be no certainty in the lands granted by the law itself, if it excepted lands from grants in a place which had no place at the time of our location. There is certainty in the grant, but no certainty in the supposed exception. This would not be a reasonable construction of the proviso. The word "rights" in the proviso is not equivalent to the word "lands" in the grant, and the exception in favor of "rights" does not except "lands."

This is the fair meaning of the 23d section of the act of 1871, and agrees fully with the purpose of the forfeiture act, the effect of which is limited to the "lands" granted the Atlantic and Pacific road, and does not deal with the rights and franchises of that corporation, or the lands of the Southern Pacific Railroad Company of California.

THE RIGHT OF THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA TO INDEMNITY LANDS CONSIDERED.

Keeping in view the imminent question, and the only one that is of immediate exigency, "*Shall any restoration of lands be ordered that will disturb the withdrawals for the benefit of the Southern Pacific Railroad Company of California?*" we remark that our grants are of lands by quantity; the quantity determined by the amount of public land within the twenty-mile limits when the maps of route were accepted, and that the records of the Department show that we can never obtain the quantity granted on either line of road.

The grant is in these words:

"There be, and is hereby, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, &c."

This indemnity is unusually liberal, probably because of the denial of money subsidy along a route so difficult of con-

struction. It gives lieu lands for the lands "granted prior to said time," as well as for those of other descriptions, for which indemnity is usually given.

The provision for indemnity covered the losses already then known to exist, as well as those to be ascertained in future under the exceptions from the grant. It covered the known loss by conflict with the prior grant and withdrawal for the Central and Western Pacific roads—twenty-five miles off one end of our road—and the State swamp grant under the acts of 28th September, 1850, and the supplemental law of 23d July, 1866; the latter act, in the minds of the Land Committees, at the time resulting in this allowance of indemnity for swamp lands confirmed to the State by a prior law of the same session of Congress.

It is also true that large quantities of land along the first fifty miles of the Southern Pacific main line and along the branch line north and south of Los Angeles had been sold and located prior to the grant, and large areas were covered by Mexican grants, so that only a small percentage of the quantity of the grant could be found opposite the completed road in those localities.

That the grant is one of *quantity per mile of road* is made plain by the decision of the United States Supreme Court in the case of the Burlington and Missouri River Railroad *vs.* The United States (98th U. S. Reps., 334). The words of grant therein construed were as follows, the terms being similar to those in the grant to the Southern Pacific Railroad Company of California:

"Every alternate section of public land (except mineral "lands as provided in this act) designated by odd numbers, "to the amount of ten alternate sections per mile on each "side of the said road, on the line thereof, and not sold, re-

" served, or otherwise disposed of by the United States, and " to which a pre-emption or homestead claim may not have " attached at the time the line of said road is definitely " fixed."

In rendering the decision, the United States Supreme Court said, construing the above words of grant:

" The position *that the grant to the company was only of* " *land situated within twenty miles of the road, finds no support* " *in the language of the act of Congress. That simply declares* " *that a grant is made of land to the amount of ten sections per* " *mile on each side of the road. The grant is one of quantity,* " and the selection of the land is subject only to the limita- " tions, which the learned justice proceeds to enumerate as " applicable to that case."

The limitations in the case of the Southern Pacific road are slightly different. They require that the indemnity lands shall not be further than thirty miles from the road.

Our grant is of twenty sections per mile, but, in fact, it will be less, because the selections are limited to the strip of ten miles wide beyond the granted limits.

It will be here noticed that immediately upon the filing of our map of main line, the Secretary of the Interior, Mr. Browning, March 19, 1867, in his letter of that date to the Commissioner of the General Land Office (see Appendix) construed this grant as one of odd sections within twenty miles of the road, and the ten additional miles as limiting the boundaries from which the indemnity lands must be taken. The construction then given has since been maintained by the Land Department—Secretary Cox expressly affirmed it. (See orders of July 29, 1870, Appendix No. 3).

Secretary Cox's direction that the withdrawal of March 22, 1867, should be maintained and respected, was the ap-

propriate interpretation of the Joint Resolution of 28th June, 1870, hereinbefore quoted.

It is a fact, also, that it has been decided directly by the action of the Secretary upon an official report of the Commissioner of the General Land Office, that our grant is one of quantity per mile, with the limitations indicated.

See the report of the Commissioner of the General Land Office to the Secretary, May 21, 1880, (Appendix No. 6); sanctioned by the Secretary by the approval of the list therewith submitted, on the 19th of July, 1880.

See also Land Office Report, p. 27, March, 1882. House Ex. Doc. 144, 47th Congress, 1st session, p. 28.

In the Annual Report of the General Land Office for 1875, at p. 409, we find the "estimated quantity embraced in the limits of the grant" on the main line of our road to be 6,000,000 acres, and the "estimated quantity which the company will receive from the grant" to be 3,750,000 acres.

The grant to the Branch Line road within limits is estimated (same report and page) at 3,520,000 acres, of which the company will receive 3,000,000 acres. It is thus plain that the full quantity of each grant is cut short by the selecting limits, so that if the complications with the Atlantic and Pacific location were out of the way, our roads could not obtain the quantity granted.

These estimates were made without any deductions from quantity, because of the Atlantic and Pacific land grant.

The withdrawal of indemnity lands ought, therefore, on every principle of right, to be continued until the settlement of the grant. The company has obtained, up to this time, on its main line, patents for only 1,040,430 acres of land, and up to 30th June, 1885, only 187,719 acres had been

patented along the Branch line. (See Annual Report of the General Land Office for 1885, p. 193.)

In the case of Cedar Rapids Railroad Company *vs.* Herring *et al.* (110 U. S. Rep., p. 27), owing to a change in legislative enactments and a change in the route of the railroad, the question of quantity became material. The plaintiff in error claimed the right to quantity along the line of original location, 345 miles; the defendants in error urged that they were entitled only on the line constructed, 271 miles long. The supreme court of Iowa and the United States Supreme Court upheld the contention of the defendants, and in deciding the case (p. 35) the Court says:

"It is believed that in no instance of the many grants of "public lands made by Congress to aid in building railroads "has the quantity been measured by any other rule than "the length of the road constructed or required to be con- "structed by the grantee or its privy, and it would be the "first departure from this principle known to us, if in this "case Congress intended to give the same amount per mile "of land for road not constructed."

If we apply this principle to the case of the Southern Pacific Railroad Company, it appears that for its grant of land per mile of road actually constructed it will be entitled to quantities as follows:

On main line, completed road, 474.42 miles. Twenty sections per mile or 12,800 acres amounts to 6,072,576 acres of land.

Branch line, completed, 346.96 miles of road, acquired 12,800 acres per mile, or 4,441,088 acres.

To these large quantities of land we had fully acquired the right to have patents before the forfeiture act of July, 1886, was passed. These figures show that *no restoration to*

market of any withdrawn lands could properly be made, if the Department had the power to make it.

If we are to regard the mention of the six several descriptions of land in the Commissioner's letter, as an intimation that some construction may be placed on the said forfeiture act which may deprive our company of a portion of its lands, we here resolutely protest against it, because the executive department is bound to maintain the indemnity withdrawal to the last acre, so long as it is shown that we cannot, under the most favorable circumstances, obtain the quantity of our grants.

No lands within our limits can be restored, because under the varied provisions of our grants we are now entitled to select all agricultural lands found vacant within our limits. Though the mineral lands within the limits of the grant are excluded therefrom, they go to increase the quantity of the indemnity, for within twenty miles of our lines we have a right to select, as indemnity for mineral lands within the grant (under Sec. 3, act of 1866) any agricultural public lands to be found at the time of selection. Such agricultural lands as may be found to have been excepted from our grants at the time of definite location of the routes will be liable to selection by the company, if afterwards restored to the public domain, and they ought, therefore, to be held as withdrawn until final settlement of the grant.

So, too, if by any technicality it might be found that a few thousand acres within the granted limits have not been acquired by the Southern Pacific Company, by so many acres as the grant in limits is reduced, by the same number of acres would the indemnity claim be increased, so that it would seem to be of little moment to the United States to

withhold any lands from our patents, on any such basis as that.

The question, therefore, here arises, *of what use will it be* to the Government to restore lands to market, which it will be the duty of the Department immediately to withdraw again, or withhold for the settlement of the indemnity due our company, for it is a great fact, plainly shown by the official reports and records, that on the very best possible basis of settlement, we will not get the quantity of land which the grant was intended to give us "in consideration" of building the roads and telegraphs.

In regard, generally, to the administration of grants for internal improvements, the action of Congress in former years shows that the intention of that branch of the Government which, under the Constitution, has the power to grant public lands has been, that the grantees should have the fullest quantity to which they had the shadow of a claim.

The first important grant was to the State of Indiana for the Wabash and Erie canal. (4 Stat., 236.) This grant was supplemented by four, if not more, subsequent laws to "make "the full amount equal to one-half of five sections in width "on each side of said canal."

Act May 9th, 1848, 9 Stat., 219.

The canal grant to Ohio was by act of 24th May, 1828. (4 Stat., 305.)

Supplemental laws in aid were afterwards enacted until, by section 3 of the act of 31st August, 1852 (10 Stat., 143), the State became entitled to the full half of five sections in width on each side.

The policy of enlarging railroad land grants, that they may have the *the full quota originally expected, or more*, has been a settled policy of Congress. The Union Pacific grant was enlarged, and its promised benefits to the companies increased in many ways, by legislation supplemental to the original grant. The indemnity limits of the Northern Pacific grant were enlarged by the act of 1870.

The grants for some of the roads in the following States, made between 1852 and 1857, were enlarged in 1864 and 1866, either directly or indirectly: Arkansas, Missouri, Iowa, Wisconsin, Minnesota, and Kansas.

Whilst thus the policy of Congress to deal liberally, and concede the last acre of indemnity claimed under the original grants, has been uniformly displayed through a period of more than forty years, there is no call upon the Executive to take any action looking to the curtailment of the claims rightfully set up under our grants after the company has fulfilled its obligations to the United States. Certainly *no doubtful authority* should be exercised in a case where Congress has had the fullest opportunity and plainest observation in the premises, and has not only given no direction, but, by plain inference, has said that completed road should retain all rights acquired under the law of the grant.

RESUMÉ.

A grant of lands for aid in building a railroad, as determined by decisions of the United States Supreme Court, attaches to particular lands upon the filing and *acceptance* by the Department of a map of definite location.

Then the specific lands are located, by which the quantity is ascertained and the limits of the granted and indem-

nity selections are determined. *But by the definite location, however, an absolute right to the title of the lands was not obtained.* In the case of a railroad, aided by the grant of July 27, 1866, the title to lands could only be had by full compliance with the terms of section 4. When absolute title is vested it is beyond the power of Congress to declare a forfeiture.

Therefore it appears most conformable to the law, as settled by authoritative decisions, to say that the declarations of forfeiture and restoration did not do more than bring back the forfeited lands to the status they were in when the right, whatever it was, of the Atlantic and Pacific Company attached.

If this is correct, the removal of the withdrawals for that company, made in 1872 and 1874, leaves in full force now the prior withdrawals for the Southern Pacific Company made in 1867 and 1871, and the Government is now under obligation to proceed with patenting the lands to the Southern Pacific Railroad Company.

It will be noticed that as our lines of roads were located before the definite location of the line of the Atlantic and Pacific Company in California, the location of the latter was made by its officers, with a full knowledge of the existing withdrawals for the benefit of the Southern Pacific Company and of the resulting conflict in limits.

The location might have been made with far less of conflict, and, had it been possible to so locate that there would be no conflict whatever, the other terms of the law of grant were such that the grantees might have earned separate grants in full quantity under the same law.

It is, therefore, fully consonant with the spirit of the law for one grantee, in the absence of a location by the other, to

take what the law gives him without any abatement—that is, it is fully conformable to the terms and conditions of grant that the grantee, complying fully, should receive its full complement of lands.

There is no reason, in the nature of the case, why, on the failure of the Atlantic and Pacific Railroad Company to build any road, the Southern Pacific Railroad Company should have any less by compliance than it would get in the case supposed.

Nay, there is the strongest reason why it should have all its claim, because by building its roads it has secured, to a great extent, the public objects that Congress had in view in making both the grants. Not only have the specified roads been built in California, but the lines of railroad extending from the western portions of the Atlantic States to the Pacific Ocean have been completed so as to facilitate the commerce of this nation with China and Japan, and to secure by means of rapid transportation a better protection of the cities and settlements of our people on the Pacific coast from foreign attack and internal commotion.

Congress, by the charter and grant to the Atlantic and Pacific Company, intended to secure, as a national object, the construction of a trans-continental road. By the line of the Atchison, Topeka and Santa Fe road, in Kansas and New Mexico, and the Atlantic and Pacific road, in New Mexico and Arizona, and the Southern Pacific main line in in California, combined, this intention has been realized, and a railroad from St. Louis to San Francisco was opened in October, 1883, and is now in good order and constant use.

The Atchison, Topeka and Santa Fe Company has received its full grant in Kansas, the Atlantic and Pacific is left in possession of the full quantity of its grant of lands in New Mexico and Arizona. Why then is not the Southern Pacific in justice and right, as well as in law, entitled to the full quantity of its grants in California? In the view of meeting the expressed wishes and designs of Congress by construction of its road, as in part a substitute for the contemplated road of the defaulting Atlantic and Pacific Company in California, its right to all it claims appears to be stronger now than it could be under any other circumstances.

If under such circumstances the United States shall refuse the full, just, and earned compensation, a wrong will be done to our company by a discrimination against it, where Congress evidently intended that it should be on an equality with others. The result would be unworthy of a great and magnanimous nation, and would involve the Government and the railroad company, both, in perplexity, if not disaster.

It cannot be fairly implied that Congress intended to grant and secure to our compaay for building the western end of this transportation line *less than half the quantity of land per mile* that is given to the Atlantic and Pacific Company for building the central part of the same road in the same manner and with like equipments.

The law expressly gives to that company "twenty alternate sections per mile on each side of said railroad line through the Territories of the United States," and to our company "ten alternate sections per mile on each side" where it passess through a State.

We can see no good reason why, after this forfeiture, or

by reason of it, the United States should seek to place the Southern Pacific Company in any worse condition, or the Government in any better condition, if that be supposed to be possible, than they were in before the location of route by the Atlantic and Pacific, or than they would now be in if that location of route had never been made.

The Government, by its agreements or transactions with a third party without our consent, could not excuse itself from the fulfillment of its contract with our company, which in substance was that we should receive so much land per mile in aid of construction of our roads.

We here remark that it is also true that the branch line of the Southern Pacific Company from Tehachapa Pass to Fort Yuma has been completed within the time required by the law of the grant, and constitutes the western end of a trans-continental railroad line, which was opened January 15, 1883, from New Orleans to Los Angeles and San Francisco, as contemplated by the 23d section of the act of March 3, 1871.

The Government has received, and is receiving, the benefits arising from these through lines for the transportation of mails, troops, munitions of war, supplies, diplomatic and special agents, &c. In its land service it has received and is receiving double minimum prices for all even sections alternate to the odd sections within twenty miles of the lines of road, so that the grant of lands results in no loss of cash receipts.

In fact, the lands now being taken up in California are largely those along the lines of these and other land grant roads, showing, what would be naturally inferred in the

absence of direct proof, that settlements are chiefly made on public lands lying in the vicinity of means of transportation.

The roads have thus contributed and are contributing largely to the development of the resources of the country and the prosperity of the State of California.

Exaggerated statements have been published, and very many people have been misled and prejudiced in reference to the extent of these grants.

That they are not insignificant is true, and that Congress intended they should not be, is just as true. Congress has the constitutional power to make the grants, but the executive branch of the Government has no power to curtail them because they are ample. It has been under the liberal offers of aid by Congress that the roads have been built through unpropitious regions.

As to the roads of the Southern Pacific in California, they were to be located and built through a country at the time mostly unsettled and unsurveyed, in some places mountainous and in others barren. This was known to Congress, and the fact of a liberal grant must be credited to the wise policy of aiding internal improvements by the grant of public lands, a policy nearly as old as the land system now rapidly approaching its first centennial.

For the foregoing reasons the Government is in duty bound to concede now to the Southern Pacific Railroad Company of California the full benefits of its land grants.

A fair construction of the terms of grant leads to the conclusion that the right of said company to lands within the prescribed limits and of the specified quantity has fully vested and cannot rightfully be disturbed.

Therefore no order should be made by the Secretary to disturb the withdrawals of lands in California made for the benefit of the Southern Pacific Railroad Company. The orders of restoration of December 15, 1886, are all that the forfeiture act will justify.

Very respectfully, &c.,

HENRY BEARD,

Attorney for the Southern Pacific R. R. Co. of California.

APPENDIX.

INDEX TO APPENDIX.

No. 1.

Extracts from the act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast." (14 Stat., 292.)

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other land shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or

may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Atlantic and Pacific railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad or telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land, as aforesaid, and so on, as fast as every twenty-five miles of said road is completed as aforesaid.

SEC. 5. *And be it further enacted*, That said Atlantic and and Pacific railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling-stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best

quality, manufactured from American iron; and a uniform gauge shall be established throughout the entire length of the road; and there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the Legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereto, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year, after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and the said Atlantic and Pacific Railroad Company accept the same,

upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific railroad or any part thereof shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

No. 2.

Joint Resolution Concerning the Southern Pacific Railroad of California. (16 Stats., 382,)

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, *on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven;* and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of

said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

Approved June 28, 1870.

Act of 25th of July, 1868. (15 *Stat.*, 187.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of the State of California, shall instead of the times now fixed by law for the construction of the first section of its road and telegraph line, have until the first day of July, eighteen hundred and seventy, for the construction of the first thirty miles, and they shall be required to construct at least twenty miles every year thereafter, and the whole line of their road within the time now provided by law.

In the "Act relative to filing reports of railroad companies," 15 Stat., p. 79, "The Southern Pacific Railroad Company" of California is mentioned. (Sec. 2d.)

No. 3.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March 19th*, 1867.

SIR: Under date of January 3d, 1867, a map showing the designated route of the Southern Pacific railroad in California, filed under the act of Congress approved July 27th, 1866, was sent to you for appropriate action.

If a withdrawal of lands has not been ordered on account of said road, you will cause the necessary instructions to be issued to the local land officers to withdraw the odd sections within the granted twenty miles on each side of said road

as shown on the map before mentioned, and also withdraw the odd sections outside of the twenty miles and within thirty miles on each side from which the indemnity for lands disposed of within the granted limits is to be taken.

The even sections within the twenty-mile limits will, under the act 3d March, 1853, "An act to extend pre-emption rights to certain lands therein mentioned," be increased to $2.50 per acre, and subject to the provisions of the pre-emption and homestead laws at that price.

Mineral lands other than coal and iron are excluded from this grant.

I do not think it necessary at this time to pass upon the question as to whether this railroad company have adopted the route of any other railroad. Any identity of grant arising out of conflict of location under the first proviso in the 3d section of the act will be reserved for future consideration.

The withdrawal will be ordered to take effect upon the receipt of your instructions at the local office.

Very respectfully, your obedient servant,

O. H. BROWNING, *Secretary.*

Hon. JOS. S. WILSON,
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 22, 1867.

REGISTER AND RECEIVER,
Visalia, Stockton, San Francisco, California.

GENTLEMEN: The Secretary of the Interior has transmitted to this office a map of the designated line of route of the Southern Pacific railroad of California and directed the withdrawal of the lands granted thereto, under the act of 27th July, 1866 (Laws 1866, p. 299). The grant to this road is found in the 18th section of the above act; by that section this company is granted every alternate or odd-numbered section of public land for ten sections in width on each side of the line of route; and indemnity for lands sold, reserved, or other otherwise appropriated within the grant, from the alternate odd sections of unappropriated public land, not more than 10 miles beyond the limits of the granted sections. The limits of the grant, then, are 20 miles on each

side of the road, and of the indemnity, 30 miles on each side.

In compliance with the Secretary's instructions I herewith enclose a diagram map, having noted thereon that part of the line of route within the 20 and 30 mile limits which falls within the limits of your district, and you are hereby directed to withdraw from sale or location, pre-emption or homestead entry, *all the odd sections* within the said limits, and no entries will be allowed thereon after the receipt of this order, except where *bona fide* pre-emption claims have attached prior to that time.

The even sections within the 20-mile limits will, by virtue of the act of March 3d, 1853, be increased to $2.50 per acre, and subject to the provisions of the pre-emption and homestead laws at that price, except where pre-emption rights may have attached prior to this withdrawal; in such cases the parties may prove up and pay for their claims at the price they were held on the day of settlement. The even sections within the twenty miles will not be subject to private entry until duly offered at the increased price.

By the 6th section of the act, the provisions of which are hereby extended to the Southern Pacific road by the 18th section, the unsurveyed lands within forty miles on each side of the line of route are directed to be surveyed, and the odd sections of land granted by the act "shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided in this act." Therefore, as plats of surveys within the limits of the grant may be filed in your office, you will immediately withdraw the odd sections from pre-emption or entry of any kind, and hold the same for the benefit of the road.

This order will take effect from the date of its reception, and you will please to acknowledge the date of its receipt by you.

Very respectfully, your obedient servant,

Jos. S. Wilson,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

WASHINGTON, *July* 29, 1870.

REGISTER AND RECEIVER,
San Francisco, Cal.

GENTLEMEN: The Secretary of the Interior having informed this office that by joint resolution (copy herewith enclosed) of Congress, approved June 28, 1870, the Southern Pacific railroad Company of California are authorized to construct their road and telegraph line as near as may be on *the route indicated by the map* filed in this Department January 3, 1867, a copy of which was sent you on 22d March, 1867, I have to direct that *the reservation*, as indicated in that letter, be respected.

Please acknowledge receipt.

Yours respectfully, &c., JOS. S. WILSON,
Commissioner.

No. 4.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 16*th April*, 1874.

SIR: Referring to my letter to you of yesterday concerning the route of the Atlantic and Pacific Railroad in California, I transmit herewith two maps designating the line of said railroad in the county of San Bernardino, State of California, and to the east side of the Colorado river, in Arizona Territory, and the line of road in the State of California, between the San Miguel Mission and the Los Angeles county line. These maps were received 15th August, '72, with letter of that date from N. L. Jeffries, Esq., attorney of the company, and are approved by the Department.

Very respectfully, your obedient servant,
C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND,
Com'r G. L. O.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1874.

REGISTER AND RECEIVER,
Los Angeles, Cal.

GENTLEMEN: I transmit herewith two diagrams, which show the completed limits of the grant to the Atlantic and Pacific Railroad Company *in your district*, prepared from the maps of definite location of the road, filed in the Department August 15, 1872, and, although only recently accepted, the rights of the company must attach to the lands from that date.

You will, accordingly, withhold from sale or entry all the odd-numbered sections within the thirty-mile limits shown on the diagrams, and hold the even sections within the twenty-mile limits at $2.50 per acre.

The even sections between the twenty and thirty mile limits are not affected by the grant.

Be pleased to promptly acknowledge the receipt of this letter and diagrams.

Very respectfully,

S. S. BURDETT,
Commissioner.

[Similar instructions of same date were sent to the United States land officers at Visalia.]

No. 5.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 3*d*, 1871.

SIR: The 23d section of the act to incorporate the Texas Pacific railroad, and for other purposes, approved March 3d, 1871, authorizes "The Southern Pacific Railroad Company to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river," with the same rights and privileges and subject to the same limitations and restrictions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866.

The accompanying map, designating the route of said railroad from Tehachapa Pass, by way of Los Angeles, to the Colorado river, has been filed by Charles Crocker, Esq., president of the company, with request that the lands may be withdrawn, as provided in the 12th section of said act, "from pre-emption, private entry, and sale."

You will issue the necessary order for a withdrawal of the lands within twenty miles, and along the route designated on said map.

Very respectfully, your obedient servant,

WALTER H. SMITH,
Acting Secretary.

Hon. WILLIS DRUMMOND,
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 21, 1871.

REGISTER AND RECEIVER,
Los Angeles, California.

GENTLEMEN: By the act of March 3, 1871, section 23, the Southern Pacific Railroad Company is authorized to construct a railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same grant of lands, &c., as were granted to said company by act of July 27, 1866.

The company having filed a diagram designating the general route of said road, I herewith transmit a map showing thereon the line of route, as also the twenty and thirty-mile limits, of the grant, to the line of withdrawal of the Southern Pacific railroad under the act of 1866, and you are hereby directed to withhold from sale or location, pre-emption or homestead entry, all the *odd-numbered sections* falling within those limits.

The *even-numbered sections* within the limits of *twenty miles* you will increase in price to $2.50 per acre, and will dispose of them at that price, but only under the pre-emption and homestead laws.

When pre-emption or homestead entries may have had legal inception prior to the receipt of this order, the settlers may, of course, prove their claims, either upon odd or even numbered sections, at the rate of $1.25 per acre.

This order will take effect from the date of its receipt by you, and you will please acknowledge receipt by date.

The even-numbered sections between the twenty and thirty mile or indemnity limits are not affected by this order.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

(Reached local office May 10, 1871.)

A letter was sent to Visalia of same date, and like phraseology. Acknowledged as received, May 4, 1871.

No. 6.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *May 21st*, 1880.

Hon. C. SCHURZ,
Secretary of the Interior.

SIR: I have the honor to submit herewith for your approval or other action list No. 11 of lands in the Visalia district, California, which were selected by the Southern Pacific Railroad Company as indemnity for lands lost to the grant. The grant was made by the act of July 27, 1866 (14 Stat., 292). The joint resolution of June 28, 1870 (16 Stat., 382), authorized the company to construct its road on the route indicated by a map filed in this office January 3, 1867.

Opposite the tracts selected from lands in the indemnity limits are designated the tracts within 20-mile limits for which the indemnity is claimed. The selected lands are all within the 30-mile limits and the lost lands in the 20-mile limits, as established upon the definite location of the line of road by construction thereof.

* * * * * * *

"I am in receipt of a communication, under date of the 30th ultimo, from Henry Beard, Esq., attorney for the Southern Pacific Railroad Company of California, claiming on behalf of that company the right to have approved to said company two lists heretofore presented to this office of lands

selected by said company in lieu of lands granted, sold, &c., by the United States within the grant limits of said road prior to the date of the grant, one of which lists is made the subject of the present reference."

* * * * * * *

In the Southern Pacific case the time from whence the loss is to be determined is "prior to" the filing of the map of location. In the California and Oregon case it is "when" the original alternate sections "shall be found to have been granted, sold," &c. These phrases have the same antecedent meaning. The words "prior to" go back just as far as the words "shall be found to have been," &c. If there is any difference it must be in favor of the former expression.

I am of the opinion that the granting acts in the two cases are precisely similar in character and extent, and in the nature and means of indemnity provided, and that *both are grants of quantity*, limited only by the condition that the quantity granted shall be found within a certain distance from the line of the road, and that therefore the case of the Southern Pacific road comes specifically within the rule of the California and Oregon decision heretofore referred to.

At the same time such is the importance of the case, from the magnitude of the interests, public and private, involved in the adjustment of the several grants that may be held to be covered by the California and Oregon decision, that I feel it my duty to submit to you my conclusions upon the points considered for your formal determination and instructions thereon, and I recommend the approval of the accompanying list of selections made by the Southern Pacific Railroad Company if my views of the application to the grant to that company of the decision in the California and Oregon case be deemed correct.

Very respectfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.